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**International liability for injurious consequences arising
out of acts not prohibited by international law
(International liability in case of loss from transboundary
harm arising out of hazardous activities)**

**Third report on the legal regime for the
allocation of loss in case of transboundary harm
arising out of hazardous activities**

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I. Introduction

1. At its fifty-sixth session, in 2004, the International Law Commission adopted, on first reading, the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.¹ In paragraph 3 of resolution 59/41 and of resolution 60/22, the General Assembly drew the attention of Governments to the importance, for the Commission, of having their views on the draft principles. On the whole, the draft principles were well received by delegations participating in the debate on the report of the Commission in the Sixth Committee during the fifty-ninth session of the General Assembly. Delight was expressed that the Commission was able to produce the draft principles expeditiously, within one year of the Assembly noting the importance of the Commission completing the remaining portion of its mandate under the agenda item "International liability for injurious consequences arising out of acts not prohibited by international law".² It will be recalled that at its fifty-sixth session, in 2001, the General Assembly, while expressing its appreciation for the valuable work done on the issue of prevention,³ requested the Commission to resume its work on the liability aspects, bearing in mind the interrelationship between prevention and liability and taking into account the developments in international law and comments by Governments.⁴ In addition to the comments in the Sixth Committee, some Governments also offered written comments on the draft principles of allocation that the Commission finalized in its first reading in 2004.⁵

2. In the present report, the Special Rapporteur analyses the issues that ought to be addressed by the Commission on second reading of the draft principles in the light of comments and observations by Governments. In some instances, specific drafting suggestions were offered by Governments. Such suggestions are not part of the present report. The Commission, within the context of its Drafting Committee, will no doubt consider them at the appropriate time.

II. Comments and observations of Governments on the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities

A. Significant trends

3. The following trends appear discernible from an analysis of the comments and observations of Governments in their written responses and in statements in the Sixth Committee on the draft principles:

(a) Generally, States welcome the basic approach of the Commission that the draft should be general and residual, leaving flexibility to States to fashion specific

¹ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10)*, para. 175.

² See the statement of the Netherlands in A/C.6/59/SR.17.

³ For the text of the draft articles on prevention of transboundary harm from hazardous activities, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, para. 97.

⁴ Resolution 56/82.

⁵ A/CN.4/562.

liability regimes for particular sectors of activity, taking into consideration relevant peculiar circumstances;⁶

(b) There exists a wide acknowledgement of the approach of attaching primary liability to the operator of the activity, that is, the person who is in command or control in the management of the risk at the time the incident giving rise to transboundary damage takes place;⁷

(c) Given the nature of activities contemplated for inclusion within the scope of the draft, namely, hazardous activities, there is support for strict liability of the operator. It is understood that such liability is also limited. Further, there would be exceptions to the liability of the operator. However, such exceptions must be few.⁸ Within such a scheme, suggestions were made for the inclusion of a rebuttable presumption of causal connection between the hazardous activity and the transboundary damage. Thus the burden of proof will be on the operator to prove that he is not liable;⁹

(d) Considering that the preferred operator's liability is strict but limited, there was also support for the possibility for supplementary funding from different sources to allocate loss and to minimize as far as possible the burden on the victims of transboundary damage to bear the loss, due to such limited liability. In this regard, it was envisaged that the State of origin would participate in any such supplementary funding scheme.¹⁰ Recalling the duties of the State of origin to ensure that any hazardous activity within its territory or areas under its exclusive jurisdiction and control is conducted with its prior authorization, and that such prior authorization should be conditioned upon the operator employing best means and efforts possible to manage the risk of transboundary harm, it is asserted that the operator should further be required to have the necessary financial means to meet claims of compensation in case of transboundary damage. It is suggested that this could be secured by the operator acquiring suitable insurance or through appropriate bank and other financial guarantees;¹¹

⁶ See A/CN.4/549/Add.1, para. 5. Germany, however, doubted the value of the flexible approach as the regime suggested by the Commission, in its view, would not be self-executing. See A/C.6/59/SR.18.

⁷ A/CN.4/549/Add.1, para. 63. See also written comments of Pakistan in A/CN.4/562, sect. A, and Uzbekistan, *ibid.* The United Kingdom of Great Britain and Northern Ireland in written comments submitted to the Secretary-General (hereinafter referred to as "comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006") while strongly supporting the operator's liability and the "polluter pays" principle, opposed imposition of liability, even secondary or residual liability, on the State.

⁸ See the comments of Austria in A/C.6/59/SR.18. The United Kingdom of Great Britain and Northern Ireland, however, suggested that the strict liability regime be proposed in less rigid terms and it felt that it may not be applicable across the board to all hazardous activities (comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006).

⁹ See also written comments of Mexico, in A/CN.4/562, sect. C.

¹⁰ A/CN.4/549/Add.1, paras. 66, 68, 90 and 91. See also comments of Portugal, the Russian Federation, Sierra Leone and Mexico (A/C.6/59/SR.19 and 25). The United Kingdom of Great Britain and Northern Ireland noted, however, that imposing any residual liability on the State would be problematic (see A/C.6/59/SR.18). Kenya thought that the role of the State should be more limited and the commentary should make it clear that the State of origin is not required to set aside funds (see A/C.6/59/SR.21).

¹¹ Statement of Germany in A/C.6/59/SR.18. The United Kingdom of Great Britain and Northern Ireland noted that securing insurance and other financial guarantees is not an easy matter and that this requirement should not be imposed in a rigid manner (comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006).

(e) The importance of access to remedies was also highlighted; the State of origin and the other States concerned should allow victims of transboundary damage access to judicial and other administrative forums to pursue their claims of compensation without any discrimination and seek such remedies as are available to national victims of the same damage.¹² There is some support for the establishment of some minimum standards by way of remedies to be made available and of compensation to all victims of damage arising from the hazardous activity, and requiring States to provide the same within their national legislation.¹³ In other words, it is regarded as no longer acceptable under international law for a State to authorize a hazardous activity within its territory with a risk of causing transboundary harm and not have legislation in place which guarantees suitable remedies and compensation in case of an incident causing transboundary damage. This obligation of the State, however, is treated, according to one view, as a best effort obligation, without prejudice to the particular circumstances of the country or countries concerned;¹⁴

(f) The broad definition of damage to include damage to persons, property and environment per se within the national jurisdiction also elicited favourable comments.¹⁵ Suggestions were also made to include damage to global commons beyond national jurisdiction, perhaps to the extent that damage to such areas is directly traceable to the hazardous activity in question.¹⁶ However, regarding the question of standing to sue in case of damage to environment per se, the type of claims that would be admissible including claims concerning the "no-use value" are, in the opinion of some governments, unresolved matters and perhaps best left for a separate examination or regulated by national legislation;¹⁷

¹² The United Kingdom of Great Britain and Northern Ireland felt that the matter of access to national administrative and judicial remedies in respect of claims concerning transboundary damage is governed by private international law and should be subject to such principles (comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006).

¹³ Statement of the Netherlands in A/C.6/59/SR.17. See also written comments of the Netherlands in A/CN.4/562, sect. E.

¹⁴ See the statement of India in A/C.6/59/SR.18. See also A/CN.4/549/Add.1, sect. E.

¹⁵ The inclusion of environment per se in the definition of damage in principle 2 was objected to by a few delegations on the ground that environmental loss referred to principle 2(a)(iii) could not be easily quantified in monetary terms, and that there would be difficulties in establishing *locus standi* as well as in establishing a causal connection between the activity in question and the environmental damage (see A/CN.4/549/Add.1, para. 77). But these are not unresolvable problems. See section 2 (d) below and also commentary to principle 2, para. (12), commentaries to the draft principles adopted on first reading in 2004, *Official Records of the General Assembly, Fifty-ninth session, Supplement No. 10 (A/59/10)* (hereinafter cited as commentaries).

¹⁶ See the statements of Italy and New Zealand in A/C.6/59/SR.17. See also written comments of the Netherlands in A/CN.4/562, sect. D.

¹⁷ See A/CN.4/549/Add.1, para. 6. See statements of China, the Russian Federation and India in A/C.6/59/SR.17-19. The United Kingdom of Great Britain and Northern Ireland felt that given the complexities involved in the question of standing and the quantification of damage to environment per se, they should be better explained in the commentary. They were also of the view that State claims concerning such damage should be left outside the scope of the draft principles, and these should be confined only to claims of private parties (comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006).

(g) There was also support for the principles 5 (response measures), 7 (development of specific international regimes) and 8 (implementation).¹⁸

4. To conclude, it seems to the Special Rapporteur that there was general endorsement of the policy considerations on the basis of which the Commission had already adopted the draft principles on first reading. Some disagreements or differences of view, however, still exist on the form in which these principles could be cast. One group of States viewed it as imperative that these principles be expressed in the form of draft articles and in as prescriptive a form as possible. On the other hand, another group of States felt that the form adopted, on first reading, should be maintained; the draft principles could provide necessary guidance to States in negotiating treaties or agreements on specific sectors of activity or covering particular areas in which such activities may take place. Any other form, according to this view, would be inconsistent with the general and residual approach that the Commission has adopted and which States in general also endorsed. The matter of form on which the Commission reserved its position at the time it adopted the draft principles in the first reading thus remains to be considered before the Commission concludes its second and final reading. The Special Rapporteur addresses this matter in section C of the present report.

B. Clarifications on some issues raised

5. In their comments, States also sought other clarifications. For example, some delegations questioned the decision of the Commission to bring the regime proposed into play only in the case of significant damage.¹⁹ Moreover, whereas the draft principles deal with hazardous activities within its scope, the view was expressed that it would be useful to have an illustrative list of these activities in the commentaries.²⁰ It was also suggested that the scope of the draft principles be broadened to include liability for transboundary harm caused to neutral States in case of war between two or more States; liability arising from hazardous activity engaged in by terrorists and liability arising from storage of water in dams.²¹ Other

¹⁸ A/CN.4/549/Add.1, para. 65. See also the written comments of the Netherlands, the Czech Republic, Mexico, the United States of America and Uzbekistan in A/CN.4/562, sect. F. According to these comments, while the basic thrust of the draft principles is acceptable, they may be improved or the points at issue may be better clarified and some specific suggestions have also been made. The United Kingdom of Great Britain and Northern Ireland noted, with respect to principle 5, that the draft principle is not clear enough on the basis of the duty of States to take response measures; further, principle 4 should have a requirement imposing a duty on the operator to take remedial action, as the European directive did, with respect to principle 7, that it is important to encourage non-binding instruments both as between States and as between non-State entities, as agreement on binding instruments is not always easy; and with respect to principle 8, that the matter of implementation is a domestic matter and should not be part of the draft principles (comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006).

¹⁹ See the written comments of the Netherlands in A/CN.4/562, sect. C. The Nordic countries also objected to the use of the threshold "significant" in defining damage coming within the scope of the draft articles (see A/CN.4/549/Add.1, para. 73). See also written comments of Pakistan in A/CN.4/562, sect. A. The United Kingdom of Great Britain and Northern Ireland, on the other hand, suggested that the threshold be raised to "serious harm" and to only a foreseeable serious harm (comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006).

²⁰ See the written comments of Pakistan in A/CN.4/562, sect. A.

²¹ *Ibid.*

clarifications sought relate to the definition of terms, particularly the broad definition of damage; the relationship between draft articles on responsibility for internationally wrongful acts and the right of a State to sue as a victim for damage done to public property; methods and means by which prompt and adequate compensation could be achieved; and the role of the "polluter pays" and precautionary principles. One viewpoint desired that the regime proposed not result in multiplicity of claims,²² and such multiplicity of claims could be the result of claims of compensation for the same cause of action against the operator and the State in the same jurisdiction or claims against the State in one jurisdiction and against the operator in another jurisdiction or against the operator in multiple jurisdictions at the same time. Another viewpoint sought clarification of the status of the draft principles and felt that the exercise of the Commission went beyond codification and progressive development in the traditional sense.²³ It was pointed out that the draft principles were "clearly innovative and aspirational in character and not descriptive of current law and State practice".²⁴

6. The Special Rapporteur considers it appropriate to dispose of some of these matters in the following paragraphs.

1. Question of threshold

7. Starting first with the point made that no threshold should be prescribed in the case of transboundary damage even if such threshold is considered useful and necessary for the purpose of the draft articles on prevention, it suffices to note that this matter has been discussed at various stages in the consideration of the topic, particularly before it was divided into two parts, prevention and liability, and at all stages a threshold was considered necessary.²⁵ In this connection, it must be observed that, with the possible exception of radioactive contamination, States in their mutual relations tolerate some measure of pollution and it is generally perceived that such pollution becomes actionable only if it is significant.²⁶ While the threshold of "significant" has gained currency and acceptance in the context of the

²² See written comments of the Czech Republic in A/CN.4/562 and the statement of the United Kingdom in A/C.6/59/SR.18 and Comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006.

²³ See the statement of the United Kingdom in A/C.6/59/SR.18. See also A/CN.4/549/Add.1, para. 62.

²⁴ See the written comment of the United States of America in A/CN.4/562, sect. A.

²⁵ See A/CN.4/487, paras. 87-98. While Robert Quentin-Quentin Baxter proposed a higher threshold of "substantial harm", draft article 2 (a), provisionally adopted in 1994, suggested a lower threshold, "significant harm", which the 1996 Working Group of the Commission approved. It was then clarified that the concept of "significant" harm refers to more than "detectable" or "appreciable" harm, but to less than "serious" or "substantial" harm. Further, it was defined to mean a harm that is not *de minimis*, or that is not negligible (*ibid.*, para. 97, fn. 128). It was further suggested that given the fact the topic is dealing with activities that are not prohibited by international law, the threshold could not be placed any lower than that (*ibid.*, para. 97).

²⁶ See Phoebe N. Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford, OUP, 2000), p. 176. Rene Lefebvre, in *Transboundary Environmental Interference and the Origin of State Liability* (The Hague, Kluwer Law International, 1996), pp. 86-89, notes the need felt for a threshold and examines the rationale for and the possible ways of explaining the meaning of the threshold of "significant harm". See also J. G. Lammers, *Pollution of International Watercourses* (Martinus Nijhoff Pub. 1984), pp. 346 and 347, and R. Wolfrum, "Purposes and Principles of International Environmental Law", *German Yearbook of International Law*, vol. 33 (1991) 308-330 at 311. See also 1990 United Nations/Economic Commission for Europe Guidelines on Responsibility and Liability Regarding Transboundary Water Pollution.

topic of international liability, it is clear that it "denotes factual and objective criteria and involves a value judgment which depends on the circumstances of a particular case and the period in which such determination is made".²⁷ Thus, a deprivation which is considered to be significant at one time or in one region may not necessarily be considered to be so at another time or in another region. The matter of specifying a threshold is therefore a matter of policy that has received considerable support within the Commission throughout the consideration of the topic. Further, the point that bears repeating is that the threshold is designed to prevent frivolous or vexatious claims and is defined so as to practically allow all claims that involve more than a negligible amount of damage. In view of this, there appears no strong reason to reverse the approach adopted by the Commission with respect to maintaining the threshold of "significant" in respect of the liability aspects of the topic.

8. A separate point is also made that prescribing a threshold might be in violation of the principle of non-discrimination. This point is made on the assumption that nationals of States of origin would stand to be compensated even for trivial damage while the victims of transboundary damage would be entitled to compensation only in the case of significant damage. This might be more of a theoretical than a present or practical problem in the absence of any evidence in State practice. In any event, international law does tolerate certain forms of discrimination in treatment between nationals and foreigners. To the extent that treatment conforms to the minimum standard of treatment sanctioned by international law, which in this case is the principle of compensation for significant transboundary damage, it may be argued that there is no violation of the principle of non-discrimination if, under national law, nationals are given the right to claim compensation even without having to suffer significant damage.²⁸ Under a different perspective, it cannot be ruled out that a State may even grant foreigners the same treatment as it provides to its nationals, both as a matter of the application of the principle of non-discrimination and by choosing to apply to foreign victims a better standard than is required or mandated by international law.²⁹

²⁷ A/CN.4/487, para. 98.

²⁸ Brownlie observed in a different context but commenting on the standard of national treatment that "(A)ccess to the courts may be maintained, but with modified rules in ancillary matters: thus an alien may not have access to legal aid and may have to give security for costs. More general variations may of course be created by treaty. The various standards of treatment commonly employed are as follows: those of reciprocity, the open-door, good neighbourliness, and of identical, national, most-favoured-nation, equitable, and preferential treatment." Ian Brownlie, *Principles of Public International Law* (Sixth Edition, 2003, p. 502. Oscar Schachter, "International law in Theory and Practice", General course in Public International Law, *Recueil des Cours*, 1982, vol. 178 (1985-V), p. 321 notes that while equality for treatment is a laudable norm, "it does not justify international liability for State action based on conditions of transnational business and the economic policies of the States concerned." On the other hand, he believed that "the non-discrimination principle should require liability and preventive measures by States that sustain discrimination based on social prejudice or that act against foreign nationals in retaliation for policies of their governments".

²⁹ One may also note that international law as a result of the highly developed law of human rights provides certain minimum standards of treatment for foreigners in national jurisdictions, without discrimination between nationals and foreigners and treating them all as individuals deserving of protection of their human rights (see A. Cassese, *International Law* (Oxford, OUP, 2005), Second Edition, p. 122 and M. N. Shaw, *International Law* (Cambridge, CUP, 2005) Fifth Edition, p. 736.

2. Clarification on list of activities falling within the scope of the topic

9. Secondly, on the need to specify a list of activities which may be considered as coming within the scope of draft principles, it is appropriate to refer to paragraph 3, of the commentary to draft principle 1.³⁰ The matter of specifying a list of activities was carefully considered by the Commission and it decided against it. It is clarified that it is difficult to capture various elements that constitute risk-bearing activities, risk being "primarily a function of the application of particular technology, the specific context and the manner of operation".³¹

3. Expansion of the scope of the topic

10. Thirdly, we may consider the possibility of broadening the scope of the draft principles to include liability arising from the conduct of war on account of damage caused to neutral States, "hazardous activity caused by terrorist activity" and "transboundary damage caused by any benign activity, such as storage of water in dams".³² It has to be recalled that from the very beginning the topic was conceived to address only "activities not prohibited by international law", and activities wrongful per se were excluded.³³ It covers activities which involve a risk of causing significant harm by virtue of their physical consequences. In 1996, before the draft articles on prevention were adopted, the Working Group of the Commission recognized that the outcome would embrace activities with a continuing operation and effect.³⁴ As noted in the commentary to draft principle 4, operator's liability is exonerated where damage is the result of an act of war. In several instruments liability is excepted where damage occurs as a result of an act of armed conflict, hostilities, civil war or insurrection. Under some national legislation acts of terrorism also exonerate liability.³⁵ On the other hand, it has been the understanding that a reservoir which is perfectly safe could become dangerous as a result of an earthquake, and consequently the continued operation of such a reservoir would be an activity involving risk. Storage of water in dams could therefore be a risk-bearing activity and may be considered as covered within the draft principles, unless

³⁰ See also commentaries, *supra* note 15, principle 1, commentary, para. (3).

³¹ *Ibid.* See also, however, fn. 350, for a reference to conventions which specify the type of activities that could come within the scope of the draft principles.

³² See the written comments of Pakistan, in A/CN.4/562, sect. A.

³³ Briefly, it may be noted that if damage occurred as a result of the act of a State party to a conflict considered to have engaged in use of force in violation of the prohibition contained in customary law, such as was held to be the case with the Iraqi invasion of Kuwait, it is responsible for the damage. On the other hand, in the case of a State which is engaged in the conflict in rightful exercise of self-defence, there could be a cause of action for compensation if it violated applicable laws of war. But the problem is that claims concerning conflict usually remain unresolved with no possible determinations to be made as to wrongfulness of the use of force involved and the legality when any particular target is destroyed. For an interesting analysis, see Jay E. Austin and Carl E. Buruch, "The Kosovo Conflict: a case study of unresolved issues", in Jay E. Austin and Carl E. Buruch (eds.), *The Environmental Consequences of War: Legal, Economic and Scientific Perspectives* (Cambridge, CUP, 2000), pp. 647-664.

³⁴ *Yearbook of the International Law Commission, 1996, Vol. II (Part Two)*, A/51/10, annex I, para. (23) of commentary to article 1. See also A/CN.4/487, para. 111 (c), and article 2 (a) of the draft articles on prevention, specifying only activities with a "risk of causing significant transboundary harm" as coming within its scope.

³⁵ Commentaries, *supra* note 15, principle 4, commentary, para. (27). See also A/CN.4/543. See also sixth annex to the Madrid Protocol to the Antarctic Treaty.

excluded by the parties to a convention or a treaty which also governs the same subject matter, in a case of a dispute.

4. **Damage to environment per se and claims of compensation for damage to "non-use" values**

11. Draft principle 2 defines damage, and damage to environment per se is included along with damage to persons and property in paragraph (a). In paragraph (b), environment is broadly defined to encompass "characteristic aspects of the landscape". It must be noted that the definition refers only to the environment within national jurisdiction and control, and excludes environment as it pertains to global commons.

12. Three different sets of issues were highlighted in the observations made by Governments concerning the environment. First, it has been noted that the definition of environment in draft principle 2 did not include damage to global commons.³⁶ It may be recalled that the Special Rapporteur recommended that damage to global commons should be addressed within the scheme of the draft principles insofar as it can be traced and linked to the hazardous activities coming within the scope of the draft articles on prevention.³⁷ However, the Commission, on the basis of the recommendation of the Working Group set up at the fifty-sixth session,³⁸ decided to exclude issues concerning global commons. While it was recognized that such issues were important, it was considered best to deal with global commons separately because it raised its own peculiar problems in relation to standing to sue, proper forum, applicable law and quantification of damage.³⁹ The Special Rapporteur is convinced that these issues cannot properly be analysed within the economy of the present draft principles, where the focus is transboundary harm within the territories of the States concerned and involving their nationals and resources.

13. Secondly, some Governments viewed the definition of environment to be broad. It has to be acknowledged that the world community has come to recognize the value of the environment and the need to be ever vigilant and assess, on a continuous basis, the adverse impact of various human activities on the environment. In adopting a holistic definition of environment, the Commission was guided by the dictum of the International Court of Justice in the *Case concerning the Gabčíkovo-Nagymaros Project*.⁴⁰ Besides, several recently concluded conventions on the subject have dealt with the concept of harm to the

³⁶ A/CN.4/549/Add.1, para. 61. See also statements by New Zealand and Mexico in A/C.6/59/SR.18 and 25 and comments by the Netherlands in A/CN.4/562, sect. D.

³⁷ See A/CN.4/540, para. 36 (8).

³⁸ See A/CN.4/661, para. 2.

³⁹ On the difficulties surrounding the issue of damage to the global commons, such as standing and the proper legal basis for a claim, see: Jonathan I. Charney, "Third State Remedies for Environmental Damage to the World's Common Spaces", in Francesco Francioni and Tullio Scovazzi (eds.) *International Responsibility for Environmental Harm* (London, Graham and Trotman, 1991), at p. 150; Xue Hanquin, *Transboundary Damage in International Law*, (Cambridge, CUP, 2003), at pp. 236-269; Kathy Leigh, "Liability for Damage to the Global Commons", 14th Australian Yearbook of International Law, 1992, p. 129.

⁴⁰ *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, I.C.J. Reports, 1997, p. 7, para. 140. Commentaries *supra* note 15, principle 2, commentary para. (15).

environment.⁴¹ As a minimum, damage to the environment relates to claims involving reasonable measures of response and restoration,⁴² including clean-up costs and compensation for damage arising from impairment of environment insofar as it resulted in loss of income directly deriving from an economic interest in any use of the environment.⁴³ Given contemporary concern for the environment, the Special Rapporteur is of the view that the definition of environment is best cast in broader terms in a liability regime which is general and residual to "attenuate any limitation imposed under liability regimes on the remedial responses acceptable".⁴⁴

14. Thirdly, recognizing the value of the approach adopted by the Commission, some Governments expressed their wish to go even further to include and make admissible claims against "non-use value" of the environment. There is some support for this claim from the Commission itself: it adopted its draft articles on State responsibility, even though it is admitted that such damage is difficult to quantify.⁴⁵ The recent decisions of the United Nations Compensation Commission, in opting for a broad interpretation of the term "environmental damage" are a pointer of developments to come. In the case of the F-4 category of environmental and public health claims, the F-4 Panel of the Compensation Commission allowed claims for compensation for damage to natural resources without commercial value (so-called pure environmental damage) and also claims where there was only a temporary loss of resource use during the period prior to full restoration.⁴⁶ The broader definition of environment in the context of the draft principles opens possibilities for further developments of the law in the liability aspects.

⁴¹ Ibid., principle 2, commentary, para. (13), and *ibid.*, fn. 383.

⁴² In respect of restoration, the point is well accepted that it should aim at recreating the conditions existing prior to the occurrence of damage. Where that is not possible, costs incurred to introduce, where appropriate, elements of equivalent value are admissible. See commentary, *supra* note 15, principle 2, commentary, para. 19. For sanctioning of three compensation projects (for loss of rangeland and habitats Jordan got \$160 million, for shoreline preserves Kuwait got \$8 million and Saudi Arabia got \$46 million) by way of replacing ecological services that were irreversibly lost in the wake of the 1991 Gulf War (see panel report F4/5, Technical Annexes I-III, cited at fn. 41, Peter H. Sand, "Compensation for Environmental Damage from the 1991 Gulf War", *Environmental Policy and Law*, vol. 35/6 (2005), pp. 244-249, p. 247).

⁴³ Commentaries *supra* note 15, principle 2, commentary paras. (18)-(21).

⁴⁴ Ibid., principle 2, commentary, para. (16).

⁴⁵ See *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, article 36, commentary, para. (15): "environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs and property devaluation. Damage to such environmental values (biodiversity, amenity, etc. sometimes referred to as 'non-use values') is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify." See also James Crawford, *The International Law Commission's Articles on State Responsibility (Introduction, Text and Commentaries)*, (Cambridge, CUP, 2002), at p. 223.

⁴⁶ See S/AC.26/2005/10. See also Peter H. Sand, *supra* note 42, p. 247 set out in five instalment reports, the awards recommended by the F-4 Panel and approved without change by the Governing Council add up to \$5.26 billion, "the largest in the history of international environmental law" (*ibid.*, p. 245). See also the guidelines for the follow-up programmes for environmental awards of the United Nations Compensation Commission, *Environmental Policy and Law*, vol. 35/6 (2005), pp. 276-281.

5. Multiplicity of claims

15. Multiplicity of claims may be envisaged in a number of scenarios. In one instance, claims may be filed by a plaintiff for the damage suffered in one jurisdiction, against the State of origin for failing to discharge its obligations of due diligence and against the operator for causing the transboundary damage. The two underlying assumptions are that there is failure to observe duties of due diligence on the part of the State of origin and that failure to observe duties of due diligence did not come to the notice and could not be relied upon by the affected States and individuals until damage actually occurred.⁴⁷ Normally, if such failure had been noticed before the damage occurred, representations could have been made to the State by other concerned States and natural or legal persons to press it to perform the obligations it owed to them under international law. Most of the obligations of due diligence incorporated in the draft articles on prevention are regarded as part of customary law⁴⁸ and non-performance of any one or more of them would preclude the State of origin from asserting that the harm did not occur for want of due diligence.⁴⁹ In such a situation, State responsibility and liability of the operator would provide a basis for the claims. To the extent that there may be claims involving the same cause of action against the State and the operator, the case of multiplicity of claims is a real possibility. While State responsibility claims could lie between States, operator liability could engage the victims of damage qua natural and legal persons as plaintiffs and the operator as the respondent. Whether the claims against the State should be entertained after exhausting the claims against the operator, sometimes given the limits of liability set, or as a separate and independent charge, is a matter of debate and perhaps could also be determined by the circumstances of the case.

16. Such a multiplicity of claims however can be handled by Courts first by clubbing them, and sorting out the responsibility of the State on one hand and the liability of the operator on the other. To the extent that no direct causal link could be established between the State responsibility and the damage, the State may be required to express apology and give guarantees of performance. To the extent that there is material damage due to its non-performance, the State would have to compensate the loss suffered by the plaintiffs. As for the operator, he would be liable for the damage caused within the limits of his liability. In any case, the compensation to be received by the victims on both these accounts could not be more than the actual quantum of loss suffered by them as assessed by the courts.

17. In another scenario, multiplicity of claims arises from the fact of filing different claims for the same damage involving the same plaintiff in different jurisdictions. Here, there is a need to prevent legal action from proceeding at the same time in different jurisdictions. The 1968 Brussels Convention on Jurisdiction

⁴⁷ If the failure to observe the obligations of due diligence by the State of origin had come to the notice of the concerned States or persons and if they did not press for the observance of those obligations within a reasonable period of time, whether State responsibility could still be engaged later at the stage of consideration of claims of compensation is a matter of doubt. There is authority to say that in such cases the individuals and the States concerned would be estopped from raising issues of State responsibility (see Phoebe Okowa, *State Responsibility*, ..., *supra* note 26, p. 169).

⁴⁸ See Patricia Birnie and Alan E. Boyle, *International Law and the Environment* (Oxford, OUP, 2002), Second Edition, p. 113.

⁴⁹ Phoebe Okowa, *State Responsibility*, ..., *supra* note 26, p. 169.

and the Enforcement of Judgments in Civil and Commercial Matters provides one set of solutions. This set of solutions has been generally endorsed in a more recently proposed 2001 draft convention on jurisdiction and foreign judgements in civil and commercial matters, submitted to the first part of the diplomatic conference held at The Hague. While postulating priority for the jurisdiction of the contracting party in which the defendant is domiciled,⁵⁰ in the case of an environmental tort claim an alternative ground of jurisdiction is provided. This is the forum of the State where an act or omission causing injury took place or before the courts of the State where the damage arose.⁵¹ Thus, the claimant is provided with a choice as to the forum which he or she deems most appropriate for him or her. The provision of such a choice is considered to be based on "a trend now firmly established in both Conventions on international jurisdiction and in national systems".⁵²

18. In the matter of choice for transboundary victims between the law of the State of origin⁵³ and the law of the State of the victim,⁵⁴ there is considerable support for the principle that the law that is most favourable to the victim should be applied. The "most favourable law principle", according to the authors of the second report on transnational enforcement of environmental law to the 2004 Berlin International Law Association Conference, is adopted in several jurisdictions in Europe, Venezuela and Tunisia and possibly even in China.⁵⁵ Several authors and even those who do not normally favour this principle in all transboundary tort cases favour it in transfrontier pollution matters.⁵⁶ However, United States law appears to favour the law of the place which has the "most significant relationship" with the event and the parties.⁵⁷ In spite of the lack of total uniformity in national laws and practice, it appears to be a sound policy to adopt the "most favourable law principle" as it has

⁵⁰ This is based on the principle, which promotes the policy that the defendant is best able to defend himself or itself in the courts of the State in which he or it is domiciled. This is justified on the ground that the force of a judgement is directed against the defendant. However, while the domicile of the natural person is left to be determined by the law of each State, the case of the nationality of the legal persons or the corporation is not so well defined. The Brussels Convention and the parallel Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters "leave the determination of domicile to the law that is determined by the law of conflict of laws as administered by the courts of the State where the claim is filed" (see C. van Bar, "Environmental Damage in Private International Law", *Recueil des Cours*, vol. 268, (1997) 295-411, at p. 336).

⁵¹ See the second report (by Christophe Bernasconi and Gerrit Betlem) on Transnational Enforcement of Environmental Law, International Law Association, Berlin Conference (2004), Report of the Seventy-first Conference, Berlin, 2004, pp. 896-938, p. 900. A defence against the ground of jurisdiction is, however, admissible if it can be established that damage in the State, not being the State of origin, is not foreseeable.

⁵² *Ibid.*, p. 899.

⁵³ *Ibid.*, p. 914. Austria, Denmark, Finland, Sweden, Japan adopt the law of the place of the dangerous activity (*lex loci actus*).

⁵⁴ *Ibid.*, France, the United Kingdom, Spain, Romania, Turkey, and most recently, the Netherlands adopted the law of the place of the damage (*lex damni*). Quebec in Canada has similar legislation.

⁵⁵ *Ibid.*, p. 911.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, pp. 914-915. Under para. 2 of rule 145, of the Restatement, second, Conflict of Laws, issued in 1971, "contacts" to be taken into account are the place of damage, the place where the act that give rise to the damage was committed, the domicile, the residence, the nationality, the place of incorporation, or of the principal place of business of the parties, and the place where any relationship between the parties is centred.

the advantage of raising the level of protection to the environment and provide some sort of incentive for the operator to engage in better maintenance of his or her installation.⁵⁸

6. Legal status of the draft principles

19. On the legal status of the draft principles, while few States have expressed their position, some delegations favour casting the draft principles in the form of draft articles. This implies a readiness to accept some or most of the principles, at a minimum, as *de lege ferenda*, as evidence of consistent State practice. Clearly, some other delegations would like to treat the draft principles as purely aspirational.

20. There are obvious difficulties in identifying the legal status of the draft principles. First, in their very nature, authoritative assertions cannot be made convincingly that a principle is part of general international law merely on the basis that it has been adopted repeatedly by States as agreed provisions in texts of treaties. The difficulty would arise, for example, if the treaties concluded have not come into force or do not have any chance of coming into force. Even if they are in force, on the face of it and without more,⁵⁹ they could at best be treated as mere expressions of bilateral and multilateral accommodation and as such applicable only as between the parties to the treaties concerned. Hence, they cannot be regarded by themselves as giving rise to a general principle of international law.

21. In the case of customary law, the problem of showing consistent and uniform practice of States is itself very complicated, principally because of lack of agreement on what constitutes relevant practice. The burden of proving *opinio juris* accompanying such State practice is even more complicated, for States do not normally announce their intentions when they follow a certain practice. Assessment of *opinio juris* therefore involves subjective analysis at two levels: the level at which the State itself has to make a judgement before electing to follow what it perceives to be a consistent and uniform practice and the level of the decision-maker/observer, regarding whether States are indeed following that practice out of a conviction that it is mandatory and not merely because they find the practice convenient or expedient to follow. This makes the assessment of customary law with respect to any one principle that much more difficult.⁶⁰ Aside from the difficulties noted, as a matter of practice, despite its mandate under article 15 of its Statute, the Commission does not normally differentiate the recommendations it adopts into

⁵⁸ Ibid., p. 910.

⁵⁹ See R. R. Baxter, "Treaties and Custom", *Recueil des Cours*, Vol. 129, (1970-1), pp. 31-104, at pp. 101-102. While acknowledging the difficulties inherent in looking at treaties as conclusive evidence of customary law, Professor and later Judge Baxter pointed out that each one of the multilateral and bilateral treaties "must be weighed in balance with other evidence of customary law before the rule of international law may be ascertained". According to him "the task is easiest in the case of the law-declaring treaty, such as a codification treaty ... Even a draft of a treaty or a treaty which has not yet entered into force will have influence ... The amount of deliberation that has gone into the text, the number of participants in the process of establishing the text of the treaty, and above all, the fact that it represents, relative to the rest of the evidence of the law, a clear and uniform statement of the law commend it non-parties. It is evidence that is easy to use".

⁶⁰ Patrick Daillier, Alain Pellet, *Droit International Public* (Paris, L.G.D.J. 1999) 6th edition, pp. 330-331. See also Jörg Kammerhofer, "Uncertainty in the Formal Sources of International Law, Customary International Law and some of its Problems", *EJIL* Vol. 15, (2004), pp. 523-553.

those that belong to the codification of existing international law on the one hand and to the progressive development of law on the other.⁶¹

22. In spite of the difficulties inherent in any exercise concerning the assessment of the legal status of the draft principles, the legal value of the principles which found repeated assertion in different national legislations and treaty formulations as evidence of a predominant trend in international law endorsing some common policy preferences cannot be underestimated.⁶² The presumption in favour of *opinio juris* is strong when States choose to repeat certain formulations while rejecting other possible formulations, when they are open to be adopted, because the formulation chosen has already found wide acceptance among States. It has been pointed out that the Commission did not shy away from codifying customary principles of the law of the sea on the basis of uniform national legislation and comments of States.⁶³ It has also been noted that there is legal value to the effort of the Commission when it "consolidates developments in a particular area of law and makes them part of the *droit acquis*".⁶⁴

⁶¹ See generally, Ian Sinclair, *The International Law Commission* (Cambridge, CUP, 1987), p. 7. There was extensive discussion on the basic mandate of the Commission stated in article 1 of its statute: the object of promoting progressive development of (primarily public) international law and its codification. It is understood from the beginning of its work that a strict distinction between progressive development and codification cannot be maintained either for the purpose of choosing the methods of procedures of work or for formatting its final recommendations. It is even more difficult, as the experience of the Commission showed, to neatly separate its conclusions into those that belong to one category or the other. Sinclair noted that the Commission, at a fairly early stage in its labours, more or less abandoned the attempt to maintain a clear distinction between projects involving "progressive development" and projects involving "codification". H. W. Briggs pointed out that by the time of its 1956 report in "preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the Statute between the two activities [codification and development] can hardly be maintained" (H. W. Briggs, *The International Law Commission* (Ithaca, New York, Cornell University Press, 1965), p. 140). See also Ahmed Mahiou, *Rapport Général, in Colloque d'Aix-en-Provence: La Codification du Droit International* (Pedone: SFDI, 1999), p. 19.

⁶² A/CN.4/543, para. 6, makes a pertinent point in this regard: "The Study has not ignored the difficulties of evaluating a particular instance as 'evidence' of State practice. Different policies may motivate the conclusion of treaties or decisions. Some may be compromises or accommodations for extraneous reasons. But repeated instances of State practice, when they follow and promote similar policies, may create expectations about the authoritativeness of those policies in future behaviour. Even though some of the policies may not have been explicitly stated in connection with the relevant events, or may purposely and explicitly have been left undecided, continuous similar behaviour may lead to the creation of a customary norm. Whether or not the materials examined here are established as customary law, they demonstrate a trend in expectations and may contribute to the clarification of policies concerning some detailed principles of liability relevant to the topic. Practice also demonstrates ways in which competing principles, such as 'State sovereignty' and 'domestic jurisdiction', are to be reconciled with the new norms." See also R. R. Baxter, "Multilateral Treaties as Evidence of Customary International Law" BYBIL, Vol. 41 (1965-66) 275, where he noted the legal value of the Geneva Convention on the Law of the Sea, 1958, as a source of law for those States that had not yet become parties to them.

⁶³ Ian Brownlie, *Principles*, ... *supra* note 28, p. 384. This happened according to the author in the case of the law of the sea, where the Commission relied mostly on national legislation and comments of Governments.

⁶⁴ See the view of Professor James Crawford quoted in Alan Boyle, "Globalizing Environmental Liability: The Interplay of National and International Law", *Journal of Environmental Law*, Vol. 17 (2005), pp. 3-26, 3, at p. 19.

III. Review of some of the salient features of the draft principles

23. The draft principles adopted by the Commission on the first reading in 2004 are the result of careful assessments of trends concerning developments on the topic over a long period of time. The strength of the policy they represent and their legal value have been the subject of repeated discussion within the Commission and widely endorsed conclusions have provided the basis for their formulation. Some of the salient provisions have also received recognition as general rules of international law, even if that status is reserved to some of them at some high level of generality and no uniformity in State practice could yet be deduced with regard to the implementation of specific elements associated with the general concepts. At this point it may be instructive to review some of the salient features of the draft principles and their legal status in the light of State practice, judicial decisions and the views of commentators.

A. Precautionary approach or principle

24. This is for example the case with the "precautionary approach" adopted as principle 15 of the Rio Declaration. Some States treat this as a principle, whereas global agreements refer to it as precautionary measures. The difference in the use of terminology is not important, even though it is used with different nuances.⁶⁵ This is a principle or approach which States are required to respect in the implementation of their due diligence obligations incorporated in the draft articles on prevention of transboundary harm arising out of hazardous activities authorized to take place within the territory or under control of the State of origin. Even though it is a principle which essentially arose out of the European practice,⁶⁶ as a principle or approach of prudent management of economic development and exploitation of natural resources and biodiversity consistent with environmental protection, it is embraced worldwide.⁶⁷ Its significance and legal status may be explained thus:

Although it is evolving, the precautionary principle appears as a standard of international law at the doctrinal level as well as in practice ... but dissent

⁶⁵ According to Sands, the language of principle 15 of the Rio Declaration now attracts broad support (see Sands, *Principles of International Environmental Law* (Cambridge, CUP, 2003) 2nd Edition, at p. 268. See also generally Nicolas de Sadeleir, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford, OUP, 2002), pp. 91-223).

⁶⁶ In fact it was an approach that was first adopted in German law: see Bochmer-Christiansen, "The precautionary principle in Germany — Enabling government", in T. O'Riordan and J. Cameron (eds.), *Interpreting the Precautionary Principle* (London, Earthscan Publications, 1994). Article 174 (2) of the European Community Treaty provides that the Community policy on the environment "shall be based on the precautionary principle and on the principles that preventive action should be taken". In fact it has been endorsed by the European Court of Justice in *Case C-180/96P, U.K. v. Commission*, [1996] ECR I-3903 and in *Case T-76/96 R, National Farmers' Union*, [1996] ECR II-815. The precautionary principle has been endorsed by almost all international instruments on the environment since 1992 (see Alexandre Kiss and Dinah Shelton, *International Environmental Law* (Ardsley, NY Transnational Publishers, 2004), Third Edition, at p. 207).

⁶⁷ The ICJ in the *Gabčíkovo-Nagymaros Project case* did not pronounce on the matter, even though Hungary raised it and Judge Weeramantry referred to it with approval in his dissent. See Birnie and Boyle, *International Law ...*, *supra* note 48, pp. 118.

remains on either side of the spectrum (the European and the U.S.) considering the principle as a guideline or claiming its binding force.

...

Key elements of such a regime would be following objective risk assessment procedures, defining socially acceptable level of risk, continuing scientific research and re-examining the precautionary measures as information becomes available. The issue of burden of proof remains perhaps the most controversial aspect of the precautionary principle as reversing the burden of proof is often considered the foremost expression of the principle.

...

It is important that the status of the principle as a standard is not necessarily a step on the way to the creation of a rule. The fact that a treaty makes it a rule to use precaution does not alter the nature of precaution as a standard. The reference to reasonableness in domestic law, for example, derives its force from being a standard of judgement and cannot become a hard-line rule. International standards operate in a similar way. The precautionary principle will therefore gain its legal value from being refined by negotiators and interpreted by adjudicators rather than being turned into a traditional rule.⁶⁸

25. A set of guidelines has been developed to help policymakers and decision makers to apply the precautionary principle. These guidelines urge that while best available information may be used, which may be obtained from multiple independent and publicly accountable institutions without conflict of interest, in arriving at decisions, all social and economic costs and benefits of the application of the principle of precaution must be kept in view.⁶⁹ As noted by a learned commentator, debate about the legal status of the principle or approach is to a certain extent "too simplistic", and the reality is judicial tribunals and policymakers are paying attention to the principle and applying it to particular contexts with significant effect.⁷⁰

⁶⁸ Sonia Boutillon, "Precautionary Principle: Development of an International Standard", *Michigan Journal of International Law*, vol. 23 (2002), pp. 429-469, pp. 468-469. A similar, yet not identical, view is expressed by McIntyre and Mosedale, who assert that "the precautionary principle is therefore a tool for decision making in a situation of scientific uncertainty, which effectively changes the role of scientific data" (see McIntyre and Mosedale, "The Precautionary Principle as a norm of customary international law", *Journal of Environmental Law*, vol. 9 (2) (1997), at p. 222). The view that the principle reflects customary law has been expressed by Sands, see Sands, *Principles ...*, *supra* note 65, at p. 274.

⁶⁹ Guidelines on Precautionary Principle in the Context of Biodiversity Conservation and Natural Resource Management, prepared under a joint initiative of Fauna and Flora International, IUCN-the World Conservation Union, *Environmental Policy and Law*, vol. 35/6 (2005), pp. 274-275, at p. 275.

⁷⁰ For the application of the principle in the Indian context, see *Andhra Pradesh Pollution Control Board v. M. V. Nayudu*, 2002 (2) SCC 62. The issue involved was whether a hazardous industry should be allowed to continue in the face of a possible contamination of underground water from the effluents of the plant. The High Court of Andhra Pradesh relied on the expert evidence of the industry and allowed its operation. On an appeal, the Supreme Court, having obtained scientific evidence from wider sources and independent expert bodies, reversed the High Court permission and stopped the operation of the industry because the scientific evidence indicated a greater possibility of underground water contamination with nickel deposits being released by the effluents of the plant. The Indian Law Commission noted that the precautionary principle

26. Thus, the growing role of the precautionary principle in the context of application of the draft principles on allocation of loss during the process of occurrence of transboundary damage and after the damage has taken place remains to be seen. It is clear that during the process of occurrence of harm, the State of origin has the duty to ensure and if necessary undertake, on its own or in cooperation with the operator and other concerned and competent organizations, all appropriate response measures to mitigate the effects of harm. In this effort it is required to use the best available technology. Wolfrum regards this as a duty directly connected with the application of the precautionary principle or approach.⁷¹ The principle or approach, as already noted, has important implications in the context of making and deciding on the claims of compensation or as part of remedies that should be available to victims. For example, the suspension or closure of the activity once damage has occurred or even when threatened according to the best but quite possibly not definitive scientific evidence available, until it is cleared once again as environmentally sound, is one remedy. Accordingly, in making or deciding on the claims, particularly claims for the closure or suspension of a hazardous operation in progress, the principle of precaution appears to bear upon the standard of proof required and on reversing the burden of proof.⁷²

clearly applied here and that with "more data and by application of better scientific procedures, or better technology more accurate conclusions can always be arrived at" (Law Commission of India, One Hundred Eighty-sixth Report on Proposal to Constitute Environment Courts, September 2003, p. 18, available at <http://lawcommissionofindia.nic.in/reports>).

⁷¹ On the requirement of best available technology, Rudiger Wolfrum noted that it is closely associated with the precautionary principle (see Rudiger Wolfrum, "International Environmental Law: Purposes, Principles and Means of Ensuring Compliance", in Fred L. Morrison and Rudiger Wolfrum, *International, Regional and National Environmental Law* (Kluwer Law International, 2003), p. 15. It is also suggested that the term "available" means that "States are responsible for applying those technological advances that have already been marketed, as opposed to every new development in pollution control" (see Peter-Tobias Stoll, "Transboundary Pollution", in Fred L. Morrison and Rudiger Wolfrum, pp. 169-200, p. 182).

⁷² See, for an understanding of the application of the precautionary principle, D. Freestone, "The Road from Rio: International Environmental Law after the Earth Summit", *Journal of Environmental Law*, vol. 6 (1994), 193, at p. 211. For a mention of some instances of suspension, see Birnie and Boyle, *International Law* ..., *supra* note 48, p. 118. The International Tribunal for the Law of the Sea suspended further exploitation of bluefin tuna in the face of scientific uncertainty surrounding the conservation of tuna stocks pending the resolution of the dispute (see *Southern Bluefin Tuna cases (Provisional Measures) (Australia and New Zealand v. Japan)*, ITLOS, nos. 3 and 4 (1999), cases. For closure of activity, see the *A. P. Pollution Board Case, 2001 (2) supra* note 70. Sadeleer notes that the precautionary principle should shed new light on the duty of care and lessen the severity of having to prove causation (Nicolas de Sadeleer, *Environmental Principles* ..., *supra* note 65, p. 212).

B. "Polluter pays" principle: strict and limited operator's liability

27. There is a strong case to assert that, under customary international law, operator's⁷³ liability for damage arising from ultrahazardous activities is strict but limited. Operator's liability gained ground for several reasons and principally on the basis of the belief that one who created high risks seeking economic benefit must bear the burden of any adverse consequences of controlling the activity. This also came to be called in broad terms the "polluter pays" principle. While the "polluter pays" principle itself cannot be termed as having acquired the status of a general principle of international law,⁷⁴ operator's liability for ultrahazardous activities

⁷³ The draft principles envisage the definition of "operator" in functional terms and it is based on the factual determination of who has use, control and direction of the object at the relevant time. Such a definition is generally in conformity with notions prevailing in French law. See Elspeth Reid, "Liability for Dangerous Activities: A Comparative Analysis", *ICLQ*, vol. 48 (1999), pp. 731-756, p. 755. More generally, it is pointed out that while no basic definition of the operator generally applied has been developed, "recognition has been gained for the notion that by operator is meant one in actual, legal or economic control of the polluting activity". See Marie-Louise Larsson, *The Law of Environmental Damage: Liability and Reparation* (Kluwer Law International, 1999), p. 401. It should be clear, however, that the term operator would not include employees who work in or are in control of the activity at the relevant time. See article 2 (c) of annex VI to the Antarctic Treaty on liability arising from environmental emergencies concluded in June 2005 which States that "'operator' means any natural and juridical person, whether governmental or non-governmental, which organizes activities to be carried out in the Antarctic Treaty area. An operator does not include a natural person who is an employee, contractor or subcontractor, or agent of, or who is in the service of, a natural or juridical person, whether governmental or non-governmental, which organizes activities to be carried out in the Antarctic Treaty area, and does not include a juridical person that is a contractor or subcontractor acting on behalf of a State operator." For the text, see <http://www.aad.gov.au>. The definition of "operator" employed in principle 2 (e) of the draft adopted by the Commission in 2004 is a functional one. For this and for an illustration of the definitions on "operator" employed in some conventions, see the commentary to principle 2, paras. (26)-(29).

⁷⁴ Rudiger Wolfrum notes that "Although the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990, and the Convention on the Transboundary Effects of Industrial Accidents both refer in their preambles to the 'polluter pays' principle as being a 'general principle of international environmental law', such view is not sustained in the light of United States practice and also in the light of the uncertainties about its scope and consequences" (see Rudiger Wolfrum, "International Environmental Law", *supra* note 71). See generally Nicolas de Sadeleer, *Environmental Principles* ..., *supra* note 65, pp. 21-59. However, the "polluter pays" principle has been endorsed or is being endorsed in different national jurisdictions with varying effect. The Indian Supreme Court in the *Vellore Citizens' Welfare Forum v. Union of India*, 1996 (5) SCC 647, ruled that the precautionary principle, and the "polluter pays" principle and the new burden of proof, supported by articles 21, 47, 48A, and 51A (g) of the Constitution of India, have become part of the environmental law of the country" (report of the Indian Law Commission, *supra* note 70, p. 36). Multiple provincial statutes of Canada regarding liability for environmental damage and subsequent remediation recognize the principle. In Spain, the Spanish courts have relied on the principle *cuius est commodum eius est incommodum*, that is, the person who derives a benefit from an activity must also pay for resulting damage, to impose liability on persons for damage caused by mines, waste, damage as result of loss of water, and toxic gas. In Japan, with regard to pollution caused by mining activities and marine pollution, the polluter pays to clean up the contamination to the commons and to restore the victim's property to its pre-damage state. The French legal system endorsed in various forms the "polluter pays" principle. In *Epoux Vullion v. Société Immobilière Vernet-Christophe*, JCP 1971.2.16781, France's *Cour de Cassation* held that "the owner's right to enjoy

could be said to have acquired that status.⁷⁵ The case for strict liability for ultrahazardous or abnormally dangerous activities was held to be the most proper technique under both common and civil law to enable victims of dangerous and ultrahazardous activities to recover compensation without having to establish proof of fault on the basis of what is often detailed technical evidence,⁷⁶ which, in turn, would require on the part of victims a complete understanding of the complicated and complex operation or activity. The case for strict liability is strengthened when the risk has been introduced unilaterally by the defendant.⁷⁷ However, in the case of damage arising from hazardous activities, it is fair to designate strict but limited liability of the operator at the international level as a measure of progressive development of law.⁷⁸

his property in the most absolute manner not prohibited by law or regulation is subject to his obligation not to cause damage to the property of anyone else which exceeds the normal incommunities of neighbourhood". The new Swedish Environmental Code, 1998, which came into force on 1 January 1999, makes the party who is liable, to a reasonable extent, for pollution to pay for investigations of possible pollution, clean-up and mitigation of damage. The test of reasonableness is determined with reference to (a) the length of time elapsed since the pollution occurred, (b) environmental risk involved, (c) the operator's contribution. Ireland enacted statutes to integrate, into domestic law, international treaties imposing strict liability for oil and hazardous waste spills by ships. It is also preparing to implement the European Directive, 2004, which will become effective by 2007, and which imposed strict liability and the "polluter pays" principle for environmental harm. Irish Courts have already begun to rely upon the "polluter pays" principle. In Brazil strict liability is becoming a standard for damage caused by activities which are hazardous or those that harm or have a risk of causing harm to the environment. Intent need not be proved. Under the National Environmental Management Act, 1998, of South Africa, strict liability is imposed on operators who may cause, have caused or are causing significant pollution, degradation or environmental harm. Singapore provides strict liability for criminal offences and imposes obligations of clean-up on polluters without the need for any intentional or negligent behaviour.

Note: the information concerning different national laws and practice is based on memorandums on national laws prepared by the students of the environmental law class of Professor Dinah Shelton, George Washington University Law School, Washington, D.C., for presentation to and on file with the Special Rapporteur. See also A/CN.4/543.

⁷⁵ A/CN.4/543, after reviewing national legislation and practice at the domestic level as it concerned the operation of abnormally dangerous activities or ultrahazardous activities, concluded that "The above review of domestic law indicates that strict liability, as a legal concept, now appears to have been accepted by most legal systems. The extent of activities subject to strict liability may differ, in some countries it is more limited than in others. The legal basis for strict liability also varies from 'presumed fault' to the notion of 'risk', or 'dangerous activity involved', etc. However, it is evident that strict liability is a principle common to a sizeable number of countries with different legal systems, which have had the common experience of having to regulate activities to which this principle is relevant. While States may differ as to the particular application of this principle, their understanding and formulation of it are substantially similar. Strict liability is also increasingly employed in legislation concerning protection of the environment" (para. 112).

⁷⁶ See Elspeth Reid, *supra* note 73, p. 756. Also, A/CN.4/543, para. 23.

⁷⁷ A/CN.4/543. See also for an interesting review of the concept of liability in civil and common law.

⁷⁸ Consider the hesitation exhibited by the Working Group of the Commission in 1996 in designating damage arising from all activities covered within the scope of the draft principles subject to the regime of strict liability. It may be recalled that the Commission noted that the concepts of strict and absolute liability which "are familiar in the domestic law in many States and in relation to certain [that is, ultrahazardous] activities in international law ... have not been fully developed in international law, in respect to a large group of activities such as those

28. The point, however, should be made that in transforming the concept of strict liability from a domestic, national context — where it is well established but with all the differences associated with its invocation and application in different jurisdictions — into an international standard, its ingredients should be carefully defined while keeping its basic objective in view, that is, to make the person liable, without any proof of fault, for having created a risk by engaging in a dangerous or hazardous activity. Such a definition is necessary not only to capture the most positive elements of the concept of strict liability as they are obtained in different jurisdictions, and thus to make the international standard widely acceptable, but also to ensure that the standard adopted truly serves the cause of the victims exposed to dangerous activities, thus facilitating prompt and effective remedies.

29. This can be approached in different ways,⁷⁹ for example, by adopting a proper definition of damage as has been done in the case of draft principle 1, which defines damage as damage to person, property and environment. Second, while designating strict liability as the standard for invoking liability, it may be specified that it is meant to include all damage foreseeable in its most generalized form and knowledge of the extent of the potential danger is not a prerequisite of liability. Further, it may be noted as part of application of the rule that it is not open to the operator to plead exemption from the liability on the ground that the use involved is a natural one and it is sufficient if the use posed a risk of harm to the others.

30. Strict liability, of course, allows some defences and international treaties and national legislation which regulate the concept provide for a variety of exceptions.⁸⁰ However, in order to highlight the role the "polluter pays" principle could play in the general scheme of the draft principles on allocation of loss, it may be opportune to designate the minimum of such exceptions namely, act of armed conflict, hostilities, civil war or insurrection, act of God or nature and the act of a third party — including the acts of victims (or contributory negligence).⁸¹

covered by article 1" (*Yearbook*, ... 1996, vol. II (Part Two) (A/51/10), annex I, paragraph (1) of the general commentary to chapter III). In arriving at this conclusion the Working Group had the benefit of the Survey on liability prepared by the Secretariat (*Yearbook*, ... 1995, vol. II (Part One), A/CN.4/47).

⁷⁹ In making the following suggestions, the Special Rapporteur is guided by the helpful observations of Elspeth Reid, *supra* note 73, pp. 741-743. See also Chapter I (B) of the useful Secretariat Survey of Liability regimes, *supra* note 64, paras. 29-260. The Indian Supreme Court, in *M. C. Mehta v. Union of India*, AIR 1987 SC 1086 (the Oleum Gas Leak case), held that in the case of hazardous activities, exceptions which could be pleaded to avoid absolute or strict liability, like unforeseeable damage, and natural use, are not available (see the report of the Indian Law Commission, *supra* note 70, p. 30).

⁸⁰ See A/CN.4/543.

⁸¹ Terrorist acts are included in the most recent liability instrument: The sixth annex to the Madrid Protocol to the Antarctic Treaty entitled Liability Arising from Environmental Emergencies. The first section of article 8 of the annex, which deals with the exemptions from liability, reads as follows: "An operator shall not be liable pursuant to article 6 if it proves that the environmental damage is caused by: (a) an act or omission necessary to protect human life or safety; (b) an event constituting in the circumstances of Antarctica a natural disaster of an exceptional character, which could have been reasonably foreseen, either generally or in the particular case, provided all reasonable preventative measures have been taken that are designed to reduce the risk of environmental emergencies and their potential adverse impact; (c) an act of terrorism; or (d) an act of belligerency against the activities of the operator."

C. Notable obligations of State

31. State liability for transboundary damage for either ultrahazardous activities or hazardous activities does not appear to have support even as a measure of progressive development of law. However, a general principle of international law has clearly emerged requiring the State to perform the obligation of due diligence both at the stage of authorization of hazardous activities⁸² and in monitoring the activities in progress after authorization and extending into the phase when damage might actually materialize, in spite of best efforts to prevent the same. The International Court of Justice, in the *Case concerning the Gabčíkovo-Nagymaros Project*, noted the need, and one might say the obligation, for continuous monitoring of hazardous activities as a result of "awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis".⁸³

32. These obligations in customary law carry with them some ancillary duties as well. An extension of this obligation for the purpose of present draft principles is the duty of the State concerned to be ever vigilant and be ready to prevent the damage as far as possible and when damage indeed takes place to mitigate the effects of damage with the best available technology.⁸⁴ States are therefore obliged to develop, by way of response measures, necessary contingency preparedness and employ the best means at their disposal once the emergency arises, consistent with the contemporary knowledge of risks and technical, technological and financial means available to manage them. The State is also under an obligation in customary law to notify all concerned States in case of any emergency arising from the operation of the activity in question when the spread of transboundary damage is imminent or is a fact.⁸⁵ Once notified, there is an obligation under customary law upon the States affected also to take all appropriate and reasonable measures to mitigate the damage to which they are exposed.⁸⁶ It is clear that the duty of care

⁸² Closely associated with the duty of prior authorization is the duty to conduct an environmental impact assessment (EIA). See Xue Hanqin, *supra* note 39, at p. 166. Phoebe Okowa notes at least five types of ancillary duties associated with the obligation to conduct EIA. One of them is that the nature of the activity as well as its likely consequences must be clearly articulated and communicated to the States likely to be affected. However, she noted that with the exception of a few conventions, it is widely provided that the State proposing the activity is the sole determinant of the likelihood or seriousness of adverse impact. None of the treaties under consideration permit third States to propose additional or different assessments if they are dissatisfied with those put forward by the State of origin. See Phoebe N. Okowa, "Procedural Obligations in International Environmental Agreements", *BYBIL*, vol. 68 (1996), pp. 275-336, pp. 282-285, p. 285. On the content of EIA, *ibid.*, fn. 25, p. 282, p. 286.

⁸³ Judgment, *I.C.J. Reports*, 1997, p. 7, para. 112.

⁸⁴ *Ibid.*, at para. 140. The Court stated that it is mindful that in the field of environmental protection vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. On the requirement of best available technology, see *supra* note 71.

⁸⁵ Phoebe Okowa, *State Responsibility...*, *supra* note 26, p. 170, who thoroughly analysed the various components of the due diligence obligations, including their legal status, is very positive about the duty of the State of origin to notify all concerned States in case of an emergency situation of the dangers to which they have been exposed.

⁸⁶ In the *Gabčíkovo-Nagymaros Project case*, in defence of the variant C it implemented on the river Danube appropriating nearly 80 to 90 per cent of the water of the river Danube, in the face of Hungary's refusal to abide by the terms of the treaty concluded between Czechoslovakia and Hungary in 1977, Slovakia argued that "It is a general principle of international law that a party

expected of a State in this regard is the duty associated with good governance. Nevertheless, it must be borne in mind, given the wide divergence of social and economic conditions obtaining among States, as principle 11 of the Rio Declaration notes so aptly, that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.⁸⁷

D. Principle of non-discrimination and minimum standards

33. The principle of non-discrimination is referred to in paragraph 3 of draft principle 6 and provides that States should ensure no less prompt, adequate and effective remedies to transboundary victims than those available to its nationals. That principle could thus be seen to be referring to both procedural and substantive requirements. The first requirement, which is essentially a procedural one, means that the State of origin should grant access to justice to the residents of the affected State on the same basis as it does for its own nationals. This is a requirement which is gaining increasing acceptance in State practice.⁸⁸ The second, the substantive aspect of the requirement of non-discrimination, on the other hand, raises more difficult issues concerning its precise content and lacks similar consensus.⁸⁹ It is suggested that as long as the same

injured by the non-performance of another contract party must seek to mitigate the damage he has sustained". The Court referring to this principle noted that "it would follow from such a principle that an injured State which has failed to take necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided." The Court observed that "(W)hile this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act." It is a different matter that the Court found the implementation of variant C as a wrongful act and hence did not go further to examine the principle of the duty of the affected States to mitigate the effects of damage to which they are exposed. See Judgment, *I.C.J. Reports*, 1997, p. 7, para. 80. The very willingness of the Court to consider any failure in this regard as an important factor in the computation of damages to which those States would eventually be entitled amounts to an important recognition under general international law of the duty imposed on States affected by transboundary harm to mitigate the damage to the best extent they can.

⁸⁷ For a note on some of the general rules of international law applicable to the discharge of the duties of due diligence, see Peter-Tobias Stoll, *supra* note 71, pp. 180-183, and for the need to apply the standard of due diligence with due regard for the economic and social factors affecting States, pp. 181-182. For a suggestion that if the State community "wishes to enhance the technology used, there is the possibility of doing so by transferring the appropriate conservation or preventive technology to the States which have no access thereto for economic or other reasons", see Wolfrum, *supra* note 71, pp. 15-16.

⁸⁸ See Alexandre Kiss and Dinah Shelton, *International Environmental ...*, *supra* note 66, pp. 201-203, and Birnie and Boyle, *International Law ...*, *supra* note 48, pp. 269-270. According to the procedural aspect of non-discrimination, some requirements of the procedural laws of the State of origin should be removed, among them are, as Cuperus and Boyle note, "the security of costs from foreign plaintiffs, the denial of legal aid and the denial of jurisdiction over actions involving foreign land" (K. W. Cuperus and A. E. Boyle, *Articles on Private Law Remedies for Transboundary Damage in International Watercourses*, International Law Association, Report of the 67th Conference, Helsinki (1986) at pp. 406-407).

⁸⁹ Birnie and Boyle note that insofar as it is possible to review State practice on such a disparate topic as equal access, it is not easy to point to any clear picture (*ibid.* pp. 271-274). On the limitations of the non-discrimination rule, *ibid.* pp. 274-275. Also see Xue Hanqin, *Transboundary ...*, *supra* note 39, pp. 106-107. Also see Alexandre Kiss and Dinah Shelton, *International Environmental ...*, *supra* note 66, pp. 201-203. Birnie and Boyle, *International Law*, *supra* note 48, pp. 269-270. P. M. Dupuy, "La contribution du principe de non

substantive level of remedies is provided to transboundary victims as those made available to the nationals, the requirements of the principle should be treated as fully complied with.

34. Viewed thus, as paragraph (7) of the Commentary to draft principle 6 notes, for all its disadvantages, "in providing access to information, and in ensuring appropriate cooperation between relevant courts and national authorities across national boundaries, the principle does go beyond the requirement that States meet a minimum standard of effectiveness in the availability of remedies for transboundary claimants".⁹⁰ As the same Commentary notes, the disadvantage remains that paragraph 3 of principle 6 does not, and given the economy of the draft, cannot "alleviate or resolve problems concerning choice of law", which are a significant factor and at the moment an "obstacle" to the delivery of prompt, adequate and effective judicial recourse and remedies to victims. States, with the assistance of appropriate professional bodies, must continue to strive both bilaterally and multilaterally to alleviate these problems.

35. In some regions, the content of minimum standards is continually being improved. However, to achieve such minimum standards at the global level there has to be a greater economic, social and political integration of values among different States and across regions in the world.⁹¹ Thus, while an absolute equality cannot be ensured in all jurisdictions by way of global common minimum standards, it should still be possible to suggest that the principle of non-discrimination does assume that suitable remedies and adequate compensation would be available to nationals in the first instance in case of any damage arising from hazardous activities and that the same remedies and levels of compensation would be available to the transboundary victims as well.

E. Ensuring prompt and adequate compensation

36. Draft principle 3 refers to prompt and adequate compensation as the main objective of the draft principles. The standard of promptness and adequacy, which is observed to be the most significant contribution of the scheme adopted by the Commission in 2004, is a standard that has support in the *Trail Smelter Arbitration*, principle 10 of the Rio Declaration and article 235 (2) of the 1982 United Nations Convention on the Law of the Sea, in article 2(1) of the 1996 Helsinki articles on international watercourses, prepared by the International Law Association, and in human rights law precedents.⁹²

discrimination a l'elaboration du droit international de l'environnement, *Revue Québécoise de Droit International*, Vol. 7 (1991-1992) p. 135. For the view that the principle of non-discrimination has become a principle of general international law, see Henri Smets, "Le principe de non-discrimination en matière de protection de l'environnement", *Revue Européenne de Droit de l'Environnement*, 1/2000, at p. 3. On the limitations of the non-discrimination rule, see Birnie and Boyle, *ibid.*, pp. 274-275.

⁹⁰ *Official Records of the General Assembly, Fifty-ninth session, Supplement No. 10 (A/59/10)*, principle 6, commentary, para. (7).

⁹¹ Xue Hanqin in *Transboundary ...*, *supra* note 39, pp. 107, 108, makes the point well when she notes first that "damage recovery is not merely concerning judicial justice, but an economic issue requiring resource allocation", and second, that even "when within an ecological system, where each and every portion of the resources is physically interrelated, national boundaries cannot simply be overlooked, since different political, economic and social systems exist within them."

⁹² For helpful guidance on the strength of the principle of prompt and adequate compensation see Boyle, *Globalizing ...*, *supra* note 64, p. 18.

37. In this connection, it should be clarified that "promptness" refers to the procedures that would govern access to justice and rendering necessary decisions in accordance with the law of the land determining the compensation payable in a given case. This is also a necessary criterion to be emphasized in view of the fact that litigation in domestic courts involving claims of compensation could be costly and protracted over several years. To render access to justice more widespread, efficient and prompt, suggestions have been made to establish special national or international environmental courts.⁹³ On the other hand, "adequate" compensation could refer to any number of things.⁹⁴ For example, the lump sum amount of compensation agreed upon as a result of negotiations between the operator or the State of origin and the victims or other concerned States following the consolidation of claims of all the victims of harm is an adequate compensation. Compensation awarded by a Court as a result of the litigation entertained in its jurisdiction is adequate as long as the requirement of due process of law is met. In any case, as long as compensation awarded is not arbitrary or grossly disproportionate to the damage actually suffered, even if it is less than full can be regarded as adequate. In other words, adequacy is not intended to denote "sufficiency".

IV. Final form of draft principles

38. It must first be observed that although the projects on prevention and on allocation of loss in case of damage (including liability) were conceived originally as integral, they have actually proceeded substantively at two different levels. The draft articles on prevention were developed with a wide consensus on the content, which received ever growing acceptance in State practice and even more importantly, recognition in judicial decisions around the world. On the other hand, the draft principles on allocation of loss are built upon some general principles on which wide consensus exists. For example, the basic objective of the draft principles, the obligation to provide prompt and adequate compensation to victims of transboundary damage, is well accepted in State practice and national judicial decisions, and some commentators treat it as a general principle of international law. Accordingly, at least one commentator suggested that the Commission should consider changing the language in draft principles 4(1), 6(1) and (3) from a mere recommendatory form to a more prescriptive one by replacing the word "should" with the word "shall" if the progress of the Commission on this important subject is not reduced to a mere "illusion".⁹⁵

39. However, as concerns the complex of associated obligations which are equally important to give full effect to the basic obligation, it appears time is needed for them to gain judicial recognition and affirmation in State practice. The obligations

⁹³ A. Rest, "Need for an International Court for Environment? Underdeveloped Legal Protection for the Individual in Transnational Litigation", *Environmental Policy and Law*, Vol. 24 (1994), pp. 173-187. At the national level, the Indian Law Commission made a very persuasive case for the establishment of national environmental courts in India (see Law Commission of India, One Hundred and Eighty-Sixth Report on Proposal to Constitute Environment Courts, September 2003). Access to justice, particularly in environmental matters is an essential facet of article 21 of the Indian Constitution. New Zealand and Australia already have environmental courts. Available at <http://lawcommissionofindia.nic.in/reports>.

⁹⁴ For an exhaustive enumeration of the implementation of the principle of prompt, adequate and effective compensation in practice, see Rene Lefebvre, *Transboundary Environmental ...*, *supra* note 26, ch. 7, pp. 229-312.

⁹⁵ Boyle, *Globalizing ...*, *supra* note 64, p. 19.

of conduct and the due diligence obligations which the draft principles suggest that the State should bear to give full effect to the principle of prompt and adequate compensation to the victims of transboundary damage arising out of hazardous activities, in contrast to the obligations of due diligence imposed upon the State in the context of prevention, require greater and more uniform acceptance in the practice of States. They also await confirmation by judicial decisions around the world as these are still few and far between. We may refer in this regard by way of illustration to the following principles: the obligation of a State to arrange for a wider net of funds, including the obligation to participate in such a fund to meet the claims of compensation when they cannot be met by the operator either because of the limited liability accepted in the law of the land or of insolvency; the obligation of a State to ensure, and the obligation of the operator to obtain, adequate levels of insurance cover for the risk-bearing hazardous operation;⁹⁶ the duty of a State to install a level of contingency preparedness and to possess a technical and economic capacity proportional to the risk of the operation; and the further duties of a State not only to monitor technologically complex operations but also to institute effective response measures in case of an incident; and the duty to move beyond the basic principle of non-discrimination and provide for administrative and judicial remedies and compensation consistent with certain minimum standards on which there is yet no sufficient clarity or consensus.

40. It is not difficult to see why the international consensus is slow in coming. There are differences in legal systems and among the practices of States even when they have similar legal systems. The difficulties inherent in any exercise of harmonization at the global level are also obvious. Political realities, priorities of development and the resource constraints of developing countries are other factors. These points are borne out by a survey of the legal status of the principles noted above and in the previous reports and as part of conclusions reached by the Special Rapporteur in his second report on the allocation of loss.⁹⁷

41. It may also be recalled that the Commission discussed in the past the matter of the form in which the end-product of the present subject matter could be adopted. While one suggestion was to adopt it in the form of a "framework arrangement" without drafting primary rules, another suggestion was to adopt it as guidelines to assist States in giving more positive content to the basic duty of cooperation. "In the event", notes Sinclair, "no final decision was taken on the form of eventual end-product, although it emerges from the debate that the topic might not yield to the treatment the Commission usually applies to the drafting of articles for eventual incorporation in a convention".⁹⁸

42. There is value in couching the entire end-product in a more prescriptive form, only if it is possible and feasible.⁹⁹ Equally, it cannot be denied that there is value in casting

⁹⁶ In the context of the European Union negotiations on the liability for environment, it is said that agreement on the directive was reached after nearly 15 years, and one of the last issues holding the agreement was the issue concerning insurance. The compromise was to make the requirement of insurance optional and not mandatory (see European Union Agrees to Make Polluters Pay for Environmental Damages, Agence France Presse, cited in the Swedish national law memorandum prepared by students of the George Washington University Law School, *supra* note 74, p. 17, on file with the Special Rapporteur).

⁹⁷ See conclusion (10), A/CN.4/540, para. 36.

⁹⁸ Sinclair, *The International Law Commission ...*, *supra* note 61, p. 38.

⁹⁹ It is stated that "(C)oncrete obligations (actions and specific measures) tend to be more stringent and rigorous, and monitoring of compliance with concrete obligations is *ceteris paribus*

the end-product in the form of draft principles when that is the best course available for lack of a better alternative.¹⁰⁰ The commentary to the draft principles noted this when it stated that:

On balance, the Commission concluded that the draft principles would have the advantage of not requiring a potentially unachievable harmonization of national laws and legal systems. It is also of the view that the goal of widespread acceptance of the substantive provisions is more likely to be met if they are cast as recommended draft principles.¹⁰¹

43. Such widespread consensus and the inherent merits of the principles themselves would have utility for judges and statesmen to give them effect in domestic and international arena. This might pave the way for eventual codification of international law on the subject by international agreement.

44. Given this reality, it seems appropriate, in the view of the Special Rapporteur, to confirm that the end-product of the topic on allocation of loss be cast in the form of draft principles. However, the Commission may give some serious consideration to reflecting the basic obligation on the duty to pay compensation and the right to seek remedies in language that is more prescriptive.

V. Relationship between draft principles and the draft articles on prevention

45. The question then arises as to the relationship between the draft articles on prevention which are awaiting further action in the General Assembly and the draft principles on allocation of loss. It is suggested that it may be feasible for the General Assembly to adopt the draft articles on prevention. Indeed, in 2001 the Commission recommended to the General Assembly the elaboration by the

considerably easier than doing it with other categories of obligations. In addition, concrete obligations have a potential for preventing disputes, especially if obligations at the same time implicitly or automatically constituting direct rights for parties, such as obligations relating to transboundary activities (e.g., the 1998 Rotterdam Convention on the Prior Informed Consent Procedures for Hazardous Chemicals and Pesticides in International Trade and the CPB)"; see Veit Koester, "Global Environmental Agreements-Drafting, Formulation and Character", *Environmental Policy and Law*, Vol. 35/4-5 (2005), pp. 170-183, p. 173). However most multilateral environmental agreements are a good example of "the art of the possible", because they are adopted by consensus. The process has been described as a strong tendency to seek the "lowest common denominator", and in even more pessimistic ways. But the fact is that "countries desire to become parties and therefore promote provisions with which they will be able to comply, assessing to that end not only to what extent, for example, amendments of national legislations are needed, but also to what extent they are feasible, their economic consequences, etc. Considerations like this can hardly be criticized" (ibid., p. 170).

¹⁰⁰ Ibid., p. 174. It has been observed that "soft law instruments provide for many advantages such as the willingness to adopt clear (ambiguous) commitments, which are more effective because they are more easily translated into specific actions and more readily reviewed and evaluated. Research has also demonstrated that the influence of soft law instruments on behaviour can be very positive, and that the 'benefits of non-binding instruments due to several reasons often [are] most evident when applied in tandem with legally binding measures'. So 'soft' law instruments can be a means to further effectiveness. Furthermore, such instruments can improve compliance and serve as tools for preventing disputes to the extent they provide clarity about the detailed and precise content of commitments under the treaty."

¹⁰¹ General Commentary, para. (14), Commentary, *supra* note 15, p. 160.

Assembly of a convention on the basis of the draft articles on prevention of transboundary harm from hazardous activities. As appropriate, this may be done in a review within a working group of the Sixth Committee. Such a review may consider including some elements of liability in the draft articles on prevention in the form of a draft article on liability to endorse the obligation of States to ensure effective judicial access and remedies and prompt and adequate compensation to victims of transboundary damage. The same draft article could note that this basic obligation should be achieved keeping in view the draft principles on allocation of loss which the Commission may wish to finalize in the second and final reading. These draft principles could be annexed in a separate part of any accompanying resolution.

46. The other possibility is to treat the prevention and liability aspects, although interrelated, entirely separately. Two separate resolutions may be adopted by the General Assembly endorsing and adopting the draft articles on prevention on the one hand and draft principles on allocation of loss on the other. The Commission could suggest these possibilities to the Assembly. Eventually, this is essentially a matter for the Assembly to decide after due consideration of the matter.



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Seventh report on diplomatic protection

by John Dugard, Special Rapporteur

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A. Introduction*

1. The International Law Commission completed the first reading of a set of 19 draft articles on diplomatic protection at its fifty-sixth session, held in 2004.¹ The Commission subsequently decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006. By a note dated 19 October 2004, the Secretariat invited Governments to submit their written comments by 1 January 2006. As at 26 January 2006, written comments had been received from the following 11 States: Austria, El Salvador, Guatemala, Mexico, Morocco, the Netherlands, Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), Panama, Qatar, United States of America and Uzbekistan.²

2. Since 2000, when the first draft articles on diplomatic protection were approved by the Commission, there has been a steady flow of books (both monographs and new editions of general treatises) and scholarly articles on diplomatic protection, with particular reference to the work of the Commission. A bibliography of these writings appears in the annex to the present report.

3. Many of the post-2000 publications deal with the nature of diplomatic protection and consider the question whether diplomatic protection is a procedure for the protection of the individual's human rights or a mechanism for the protection of the interest of the State exercising diplomatic protection. Some of them seriously question the validity of the rule in the *Mavrommatis Palestine Concessions* case that:

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right — its right to ensure, in the person of its subjects, respect for the rules of international law.³

Such critics correctly argue that several of the requirements for the exercise of diplomatic protection — such as the continuous nationality rule, the exhaustion of local remedies and the assessment of damages — indicate that the claim is in reality that of the individual and not of the State. This argument, however, fails to take into account the distinction between primary and secondary rules of international law, a distinction which is fundamental to the present draft articles. The individual has a right not to be tortured or not to be deprived of his or her property without compensation. These rights clearly are not the rights of a State. These rights of the individual, the violation of which may give rise to the exercise of diplomatic

* The Special Rapporteur wishes to acknowledge, with gratitude, the assistance of Annemarieke Künzli, PhD Fellow at the University of Leiden, and Alex Smithyman, formerly of New York University and presently of Chen Palmer, Wellington, New Zealand, who served as an intern to the Special Rapporteur in 2005.

¹ See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10)*, para. 59.

² These comments were published in document A/CN.4/561 (hereinafter referred to as "Comments").

³ *Mavrommatis Palestine Concessions* (Greece v. United Kingdom), 1924 P.C.I.J. Series A, No. 2, p. 12.

protection by his or her national State, belong to the field of primary rules of international law. However, the right of the State to exercise diplomatic protection in response to the violation of such a primary rule of international law by espousing the claim is a secondary rule of international law.⁴ As the international legal personality of the individual is incomplete, owing to the limited capacity of the individual to assert his or her rights, the fiction inherent in the *Mavrommatis Palestine Concessions* case is the means employed by international law — a secondary rule — to enforce the primary rule, which protects the undoubted right of the individual. In the light of the fact that the draft articles are premised on the soundness (if not accuracy) of the *Mavrommatis* rule (see, in particular, article 1), little purpose would be served by an examination of criticisms of the rule at this stage. The writings in question do, however, serve to emphasize that diplomatic protection is an instrument which allows the State to become involved in the protection of the individual and that the ultimate goal of diplomatic protection is the protection of the human rights of the individual. In this sense, diplomatic protection and human rights law complement each other.⁵ This notion is strongly endorsed by the Netherlands, which urges the Commission to pay closer attention to the position of the individual in the formulation of its draft articles.⁶

4. Some of the literature is critical of decisions of the Commission not to include certain proposals. For instance, criticisms have been directed at the Commission for failing to impose a duty on States to exercise diplomatic protection by way of progressive development.⁷ As these matters cannot, and should not, be reopened for discussion at second reading, they are not considered in the present report.

5. Several scholarly reviews deal critically with the language or content of particular provisions in the draft articles. They are considered in the course of the re-examination of such provisions, as are the comments of States.

6. No attempt is made in the present report to draft articles dealing with matters that will need to be included if the draft articles are translated into treaty form, such as signature, ratification and dispute settlement. In this respect, the precedent of the draft articles on responsibility of States for internationally wrongful acts is followed. The fate of the present draft articles is closely bound up with that of the draft articles on responsibility for internationally wrongful acts. If a decision is taken to translate the latter into treaty form, it is probable and desirable that the

⁴ See C. Dominicé, "La prétention de la personne privée dans le système de la responsabilité internationale des Etats" in *Studi di Diritto Internazionale in Onore di Gaetano Arangio-Ruiz* (2004), p. 729; C. Dominicé, "Regard actuel sur la protection diplomatique" in *Liber Amicorum Claude Reymond* (2004), p. 73.

⁵ L. Condorelli, "L'évolution du champ d'application de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), p. 1; J.-F. Flauss, "Vers un aggiornamento des conditions d'exercice de la protection diplomatique" in J.-F. Flauss, *La Protection Diplomatique* (2003), p. 29; P. H. Kooijmans, "Is the right to diplomatic protection a human right?" in *Studi di Diritto Internazionale in Onore di Gaetano Arangio-Ruiz* (2004), p. 1975; M. Faria Tinta, "Due process and the right to life in the context of the Vienna Convention on Consular Relations: arguing the *La Grand* case", *European Journal of International Law*, vol. 12, No. 2 (2002), p. 363; M. Pinto, "De la protection diplomatique et la protection des droits de l'homme", *Revue Générale de Droit International Public*, vol. 106, No. 3 (2002), p. 513.

⁶ Comments, p. 10.

⁷ E. Milano, "Diplomatic protection and human rights before the International Court of Justice: re-fashioning tradition?", *Netherlands Yearbook of International Law*, vol. 35 (2004), p. 85, at pp. 94-97; P. H. Kooijmans, note 5 above.

present draft articles be incorporated into any such treaty. If, on the other hand, the draft articles on State responsibility retain their present status as a restatement of the law, it seems inevitable that the present draft articles will serve the same purpose.

7. The present report will examine the draft articles approved by the Commission at first reading in the context of comments, criticisms and suggestions made by Governments and scholars in respect of those articles. Where necessary, an amended or new provision will be proposed to take the place of the previous draft article. Only one major innovation will be proposed. Some members of the Commission, some States and some academic writers have called upon the Commission to include a provision dealing with the payment to a national of compensation received in respect of injury to that national by the State of nationality. A proposal to that effect is included after the examination of the 19 draft articles.

B. Consideration of draft articles

1. Article 1

Definition and scope

Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

8. The comments on article 1 fall into three categories: those calling for clarity in language or changes to the text; those suggesting additions to the commentary; and those calling for a clear distinction to be made between diplomatic protection and consular assistance. The third category is certainly the most important and will be fully considered. Other comments and suggestions may be more easily disposed of.

9. Uzbekistan suggests that the draft articles include a provision indicating the sense in which terms such as "nationality of a legal person", "incorporation" and "damage to property" are used.⁸ It also objects to the use of the term "nationality" in respect of legal persons, on the ground that nationality is an attribute of natural and not legal persons.⁹ This calls for two comments. First, definitions are dangerous and often create more problems than they solve.¹⁰ It is wiser to explain the meaning of terms in the context of each rule — which the draft articles attempt to do. Second, in law the term "nationality" is used so frequently in respect of legal persons that it is impossible to discard this usage.

10. The Netherlands suggests that it should be made clear that article 1 includes stateless persons and refugees within the meaning of article 8.¹¹ It is proposed that this suggestion be accepted by an amendment to the text.

11. Guatemala has proposed an addition to paragraph (7) of the commentary on article 1 to make it clear that diplomats and consuls may benefit from diplomatic protection where they act outside their official capacities.¹² This will be done.

⁸ Comments, p. 51. The full comment from Uzbekistan makes the nature of its suggestion clearer.

⁹ Comments, p. 12.

¹⁰ "A definition ... often creates more problems than it solves" — Lord Reid in *Brutus v. Cozens* [1972] 3 W.L.R. 521, at p. 525.

¹¹ Comments, p. 12.

¹² Comments, p. 11.

12. Article 1 makes it clear that “an internationally wrongful act of another State” is a requirement for diplomatic protection. This does not preclude a State from taking steps to protect its nationals before a wrongful act has occurred, but such measures do not qualify as diplomatic protection.¹³ The Netherlands has wisely suggested that this matter be clarified in the commentary.¹⁴

13. The commentary should also make it clear that the reference to “national” in article 1 includes the protection of groups of nationals — as suggested by Condorelli.¹⁵

14. Several States have suggested that article 1 and its commentary provide greater clarity on the meaning of the terms “diplomatic action” and “other means of peaceful settlement” and that a clear distinction be drawn between diplomatic protection and consular assistance.¹⁶ Academic writings have made the same point. This matter therefore requires careful consideration.

Diplomatic protection and consular assistance

15. International law recognizes two kinds of protection that States may exercise on behalf of their nationals: consular assistance and diplomatic protection.¹⁷ There are, however, fundamental differences between the two and a persistent subject of debate and controversy is the question of which activities by Governments fall under diplomatic protection and which actions do not. This debate is fuelled by an equally persistent misunderstanding of the definition of the term “action” for the purpose of diplomatic protection, resulting in actions being mistakenly classified as an exercise of consular assistance. The problem is not so much what constitutes consular assistance, but the definition of action for the purpose of diplomatic protection to the exclusion of consular assistance.

16. Diplomatic protection is often considered to involve judicial proceedings. Interventions outside the judicial process on behalf of nationals are sometimes not regarded as constituting diplomatic protection but as falling under consular assistance instead. This, however is too narrow a view of diplomatic protection. Any intervention, including negotiation, at inter-State level on behalf of a national vis-à-vis a foreign State should be classified as diplomatic protection (and not as consular assistance), provided that the general requirements of diplomatic protection have been met, i.e., that there has been a violation of international law for which the respondent State can be held responsible, that local remedies have been exhausted and that the individual concerned has the nationality of the acting State. That such a broad view of “action” in the context of diplomatic protection is warranted is

¹³ This view is disputed by Condorelli; see “L’évolution du champ d’application de la protection diplomatique” in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), p. 3, at p. 7.

¹⁴ Comments, p. 12.

¹⁵ Note 13 above, at pp. 6-7.

¹⁶ Comments, pp. 11 (Austria), 12 (Netherlands, Panama) and 8-9 (El Salvador).

¹⁷ Another source of confusion concerns diplomatic representation and diplomatic protection. They are, however, very different in nature for, as Warbrick and McGoldrick state, “Diplomatic representation covers a wide range of communications from one government to another, in which one expresses its disapproval about some action or inaction of the other. They do not necessarily impute unlawful conflict to the other State ...” — a requirement for the exercise of diplomatic protection. (*International & Comparative Law Quarterly*, vol. 51, No. 3 (July 2002), p. 723, at p. 724).

supported by doctrine¹⁸ and both international¹⁹ and national²⁰ judicial decisions. Article 1 and its commentary give clear support to such a broad interpretation of diplomatic action. Article 1 provides that diplomatic protection comprises "resort to diplomatic action or other means of peaceful settlement" and paragraph 5 of the commentary states that "'Diplomatic action' covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest, request for an inquiry or for negotiations aimed at the settlement of disputes. 'Other means of peaceful settlement' embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement". It is difficult to draft a more comprehensive provision and commentary on the meaning of diplomatic "action" in the context of diplomatic protection. It is therefore suggested that the present draft article should not be rephrased. The provision does not, however, expressly exclude consular assistance, and this is a matter that requires further attention.

17. Unfortunately, neither Government officials nor legal scholars²¹ distinguish clearly between diplomatic protection and consular assistance. There are, however, three structural differences which should act as a guide to the distinction between the two institutions. First, the limited nature of consular functions provided for in the Vienna Convention on Consular Relations of 1963²² (hereinafter "Vienna Convention") compared with the less limited function of diplomats contained in the Vienna Convention on Diplomatic Relations of 1961;²³ second, the difference in level of representation between consular assistance and diplomatic protection; and third, the preventive nature of consular assistance as opposed to the remedial nature of diplomatic protection. Consuls are seriously limited in respect of the action they may take to protect their nationals by article 55 of the Vienna Convention, which provides that consuls "have a duty not to interfere in the internal affairs of that State". This means, according to Shaw, that "They have a particular role in assisting nationals in distress with regard to, for example, finding lawyers, visiting prisons and contacting local authorities, but they are unable to intervene in the judicial process or internal affairs of the receiving State or give legal advice or investigate a

¹⁸ E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (1919), p. 439; F. S. Dunn, *The Protection of Nationals* (1932), pp. 18-19; L. Condorelli, "L'évolution du champ d'application de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), p. 6.

¹⁹ In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice declared that States are allowed to take up the case of a national "by resorting to diplomatic action or international judicial proceedings on his behalf" (1924, *P.C.I.J. Series A*, No. 2, p. 12 (emphasis added)). See too *Panevezys-Saldutiskis Railway*, 1939 *P.C.I.J. Series A/B*, No. 76, p. 16; *Nottebohm* (Second Phase), 1955 *I.C.J. Reports*, p. 24; *Reparation for Injuries*, 1949 *I.C.J. Reports*, p. 177.

²⁰ In the *Rudolf Hess* case, for instance, the German Constitutional Court considered that diplomatic démarches by the German Government were proof that the Government had fulfilled its obligations under the German Constitution, which grants a right to diplomatic protection to German citizens (*J.L.R.*, vol. 90 (1992), p. 387, at p. 396). See, too, *Kaunda and others v. President of the Republic of South Africa and Others*, 2005 (4) South African Law Reports 235 (CC), *International Legal Materials*, vol. 44, No. 1 (January 2005), p. 173.

²¹ See E. Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations*, 2nd ed. (1998), p. 33; and L. T. Lee, *Consular Law and Practice* (1991), pp. 138, 148-151, 155 and 167. See generally on this subject, A. Künzli, "Exercising diplomatic protection: the fine line between litigation démarches and consular assistance", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2006, forthcoming).

²² United Nations, *Treaty Series*, vol. 596, p. 261.

²³ *Ibid.*, vol. 500, p. 95.

crime".²⁴ This means that consuls are permitted to represent the interests of the national but not the interests of the State in the protection of the national. This is a matter for the diplomatic branch. There is another element of distinction between diplomatic protection and consular assistance. Consular assistance has a largely preventive nature and takes place before local remedies have been exhausted or before a violation of international law has occurred. This allows for consular assistance to be simultaneously less formal and more acceptable to the host State.²⁵ Consular assistance is primarily concerned with the protection of the rights of the individual and requires the consent of the individual concerned.²⁶ Indeed, as stipulated in article 36 (1) of the Vienna Convention, consular assistance will only be provided if the individual concerned so requests. A diplomatic démarche on the other hand, is designed to bring the matter to the international, or inter-State, level and is ultimately capable of resulting in international litigation. Moreover, the individual concerned cannot prevent his national State from taking up the claim or from continuing procedures in the exercise of diplomatic protection.

18. The *La Grand* and *Avena* cases²⁷ require special mention in this connection as they involved both consular assistance and diplomatic protection. In these cases Germany and Mexico, respectively, filed a case against the United States for violation of the Vienna Convention in their own right and in their right to exercise diplomatic protection, as their nationals had individually suffered from non-compliance with the Convention. The merits of the cases before the International Court of Justice thus concerned the exercise of consular assistance while the mechanism utilized to bring the claim was, in both cases, the exercise of diplomatic protection. In *La Grand* the International Court of Justice accepted Germany's claim (partly) as an exercise of its right to diplomatic protection and established that both the State of Germany and the German nationals had suffered from lack of consular assistance.²⁸ However, in the case of Mexico, the Court decided otherwise and determined that the violations of the Vienna Convention constituted a direct injury to Mexico with the result that diplomatic protection was not necessary as an instrument for bringing the claim. The *La Grand* case is particularly important. The claim Germany presented before the International Court of Justice was based on the failure by the United States to notify without delay the La Grands of their right to consular assistance and the failure to inform the German authorities of the arrest and detention of two German nationals, both obligations deriving from article 36 (1) of the Vienna Convention. Germany argued that it would have been able through the exercise of consular assistance to provide adequate legal assistance and relevant information which, in its turn, perhaps, would have prevented the La Grands from being sentenced to death.²⁹ The claim was presented both in Germany's own right and in its right to exercise diplomatic protection on behalf of its nationals.³⁰ The United States contested Germany's claim under diplomatic protection and tried to

²⁴ *International Law*, 5th ed. (2003), p. 688.

²⁵ L. Caflisch, "La pratique suisse de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), p. 77.

²⁶ J. Zourek, "Quelques problèmes théoriques du droit consulaire", *Journal du Droit International*, vol. 90 (1963), p. 4, at pp. 54-55.

²⁷ 2001, *I.C.J. Reports*, p. 466 and 2004, *I.C.J. Reports*, p. 12, respectively.

²⁸ 2001, *I.C.J. Reports*, p. 494, para. 77.

²⁹ *Ibid.*, p. 491, para. 71.

³⁰ *Ibid.*, p. 481, para. 38 and p. 489, para. 65.

convince the Court that Germany was confusing diplomatic protection and consular assistance and that the Court should therefore declare the claim inadmissible. It argued that the Vienna Convention does not deal with diplomatic protection, but only with consular assistance. In addition, it was claimed that, contrary to the argument of Germany, the Vienna Convention did not protect individual rights and therefore the exercise of diplomatic protection should not be accepted.³¹

The Court rejected the objections presented by the United States and decided that it had jurisdiction to entertain the claim based on both direct and indirect injury. It stated clearly that the general jurisdiction clause under the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes³² would not "prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national".³³ The Court clearly distinguished between consular assistance and diplomatic protection, accepting that individual rights arising under a treaty on consular relations could be claimed through the vehicle of diplomatic protection.³⁴ Diplomatic protection is a mechanism that may be resorted to after an internationally wrongful act has occurred causing injury to an alien. Since the non-compliance with the Vienna Convention by the United States gave rise to injury to the German nationals as a result of the violation of their individual rights under that Convention, Germany had invoked the proper procedure to claim redress for the injury.

19. A particular source of confusion of diplomatic protection and consular assistance is article 1-10 of the Treaty establishing a Constitution for Europe³⁵ (hereinafter "Constitution"), which corresponds to article 46 of the Charter of Fundamental Rights of the European Union³⁶ and article 20 of the Treaty establishing the European Community.³⁷ The article provides in paragraph 2 (c) that "Citizens of the Union ... shall have ... the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State".³⁸

At first sight, the provision may seem non-controversial. It is an expression of the principle of non-discrimination, which is fundamental to the European Union. Since discrimination on the ground of nationality is prohibited within the Union, it is not surprising that Union citizens should also receive equal protection outside the Union. However, by providing for both consular assistance and diplomatic

³¹ *Ibid.*, p. 482, para. 40.

³² United Nations, *Treaty Series*, vol. 596, p. 487.

³³ 2001, *I.C.J. Reports*, pp. 482-483, para. 42; see also O. Spiermann, "The *La Grand* case and the individual as a subject of international law", *Zeitschrift für öffentliches Recht*, vol. 58 (2003), pp. 197-221.

³⁴ 2001, *I.C.J. Reports*, pp. 492-494, paras. 75-77.

³⁵ *Official Journal of the European Union*, vol. 47, No. C 310 (16 December 2004), pp. 13-14 (hereinafter *Constitution*).

³⁶ *Ibid.*, vol. 43, No. C 364 (18 December 2000), p. 1.

³⁷ *Ibid.*, vol. 45, No. C 325 (24 December 2002), p. 45.

³⁸ Although the Constitution has not (yet) entered into force and thus is not yet a binding document, this is the most recent document in which the right to diplomatic protection is provided for. It should be borne in mind that this provision is literally the same as the provision in the European Community Treaty, which of course is binding upon European Union member States.

protection, the provision disregards the fundamental differences between these two mechanisms. In addition, it is particularly problematic in light of the criteria for diplomatic protection.

The principal objection to this provision is that it offends the principle of *pacta tertiis nec nocent nec prosunt*. The European treaties are treaties under international law and therefore are governed by article 34 of the Vienna Convention on the Law of Treaties,³⁹ which provides that treaties are only applicable between the parties to a treaty and are not binding on third States. Thus, any provision contained in an EU treaty, charter or constitution is not binding upon States that are not members of the European Union. Third States are not bound to respect any of the provisions contained in treaties and conventions in force within the European Union and are not obliged to — and with respect to diplomatic protection are unlikely to — accept protection by States that are not the State of nationality of an individual European Union citizen.⁴⁰

A “citizen” of the European Union is not a national of all member States of the European Union, which means that European Union citizenship does not fulfil the requirement of nationality of claims for the purpose of diplomatic protection. The European Union treaty provisions purporting to confer the right to diplomatic protection on all European Union citizens by all member States of the European Union is therefore flawed — unless it is interpreted as applicable to consular assistance only. It is submitted that this is indeed its intention.⁴¹ Although consular assistance is usually exercised only on behalf of a national, international law does not prohibit the rendering of consular assistance to nationals of another State. Since consular assistance is not an exercise in the protection of the rights of a State nor an espousal of a claim, the nationality criterion is not required to be applied as strictly as in the case of diplomatic protection. There is therefore no necessity for a legal interest through the bond of nationality.

20. In theory, the distinction between diplomatic protection and consular assistance is clear. The former is an inter-State intervention conducted by diplomatic officials or Government representatives attached to the foreign ministry which occurs when a national is injured by an internationally wrongful act committed by another State, and the national has exhausted local remedies. It is an intervention designed to remedy an international wrong, which may take many forms, including protest, negotiation and judicial dispute settlement. Consular assistance, on the other hand, involves assistance rendered to nationals (and possible non-nationals) who find themselves in difficulties in a foreign State by career consuls or honorary consuls not engaged in political representation. Such assistance is preventive in the sense that it aims to prevent the commission of an international wrong. The national is provided with consular advice and legal assistance to ensure that he receives a fair trial (if he is charged with a criminal offence) or to protect his personal or proprietary interests in the host State. Despite the clear theoretical distinction between the two institutions there are overlaps (as illustrated by *La Grand* and *Avena*) and failures to distinguish the two (as shown by the European Union

³⁹ United Nations, *Treaty Series*, vol. 1155, No. 18232.

⁴⁰ See C. Storost, *Diplomatischer Schutz durch EG und EU?* (2005), pp. 148-149.

⁴¹ T. Stein, Interim Report on “Diplomatic protection under the European Union Treaty” in International Law Association, Committee on Diplomatic Protection of Persons and Property, Second Report, New Delhi (2002), pp. 36-37.

treaties). In these circumstances, it might be wise to make it clear in article 1 that the Commission is aware of the distinction and wishes it to be maintained. The commentary will also address this issue.

21. It is proposed that article 1 be amended to read:

(1) Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national or a person referred to in article 8 in respect of an injury to that national or person arising from an internationally wrongful act of another State.

(2) *Diplomatic protection shall not be interpreted to include the exercise of consular assistance in accordance with international law.*

2. Article 2

Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

22. There are few comments on this provision. The Netherlands suggests that paragraph (3) of the commentary be deleted or clarified.⁴² It does indeed seem to be superfluous and should be deleted.

23. Paragraph (2) of the commentary states that the State has a right to exercise diplomatic protection but is under no duty to do so. This issue has been the subject of several national decisions since the Commission decided not to impose a duty on States to exercise diplomatic protection: *Abbasi and Another v. Secretary of State for Foreign and Commonwealth Affairs*;⁴³ *Kaunda and Others v. President of the Republic of South Africa and Others*;⁴⁴ and *Van Zyl & Others v. Government of the RSA & Others*.⁴⁵ These decisions, which give some support to the existence of duty to exercise diplomatic protection under national law, should be considered in the Commentary.

24. In a general comment on the draft articles Austria states:

It seems that the Commission concentrated only on one aspect of diplomatic protection, namely as a right of a State to make certain claims in the interest of its nationals. This right is, however, balanced by the corresponding obligation of the other States to accept such claims by a State. The legal regime on diplomatic protection also stipulates under which conditions a State has to accept such interventions by another State. Such a view undoubtedly sheds some new light on that legal regime and reveals different aspects of it, which the text of the Commission does not sufficiently take into account.⁴⁶

⁴² Comments, p. 13.

⁴³ (2002) EWCA Civ. 1598, [2002] All ER (D) 70; *International Legal Materials*, vol. 42, No. 2 (March 2003), p. 358.

⁴⁴ 2005 (4) South African Law Reports 235 (CC); *International Legal Materials*, vol. 44, No. 1 (January 2005), p. 173.

⁴⁵ Judgment of 20 July 2005, TPD case No. 20320/2002 (unreported at time of writing).

⁴⁶ Comments, p. 8.

It is suggested that article 2 is the appropriate place to provide for recognition of such a duty on the part of States. Article 2 might therefore be amended to read:

- (1) A State has the right to exercise diplomatic protection in accordance with the present draft articles.
- (2) *A State is under an obligation to accept a claim of diplomatic protection made in accordance with the present draft articles.*

3. Article 3

Protection by the State of nationality

1. **The State entitled to exercise diplomatic protection is the State of nationality.**
2. **Notwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with draft article 8.**

25. The Netherlands proposes that the provision be formulated to read: "The State of nationality is the State entitled to exercise diplomatic protection."⁴⁷ How this places "greater emphasis on the perspective of the individual", as suggested by the Netherlands, is difficult to understand. But it is a more elegant formulation than the present article 3 and should be adopted.

26. The Netherlands also states, without any explanation, that this provision is to be seen in the light of developments relating to European citizenship. As explained above, there is a distinction between European "citizenship" and nationality of member States. In directive 2004/38/EC,⁴⁸ the concept of European Union citizenship is defined. Although the directive primarily concerns movement and residence of individuals eligible for European Union citizenship *within* the European Union, some of its provisions are relevant to the question of protection *outside* the European Union. While it is stipulated in the preamble (point 3) that "Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence", the operative part defines a European Union citizen as "any person having the nationality of a Member State" (article 2 (1)), nationality thus being a prerequisite for European Union citizenship. In the Constitution it is stated in article I-10 (1) that "citizenship of the Union shall be additional to national citizenship and shall not replace it."⁴⁹ These provisions clearly demonstrate that citizenship cannot be equated with nationality and that European Union citizenship should not be interpreted to negate the nationality of individual States, or the power of European Union member States to determine their own nationality laws and criteria for naturalization. In these circumstances it is difficult to see how European Union citizenship can have any bearing on nationality.

27. It is proposed that article 3 should be amended to read:

⁴⁷ Comments, p. 13.

⁴⁸ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2005 on the right of citizens of the Union, *Official Journal of the European Union*, vol. 47, No. L 158 (30 April 2004), pp. 77-123.

⁴⁹ See N. W. Barber, "Citizenship, nationalism and the European Union", *European Law Review*, vol. 27 (2002), who states that "European citizenship was intended to complement, and not to replace, national citizenship" (p. 241).

(1) *The State of nationality is the State entitled to exercise diplomatic protection.*

(2) Notwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with article 8.

4. Article 4

State of nationality of a natural person

For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law.

28. Article 4 has been criticized on the ground that it fails to make it clear that nationality is determined by internal, national law — provided it is not inconsistent with international law.⁵⁰ The Commission clearly believed that this was implicit in the formulation of the provision and placed this beyond all doubt in paragraph 1 of the commentary. This may, however, be made clear in article 4 itself.

29. Austria objects to the formulation of article 4 on the ground that "nationality is not acquired by State succession but as a consequence of State succession",⁵¹ and suggests that it should be reformulated accordingly.

30. In order to meet these criticisms article 4 might be reformulated to read:

For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent or naturalization, or as a consequence of the succession of States, or in any other manner recognized by the law of that State, provided it is not inconsistent with international law.

5. Article 5

Continuous nationality

1. A State is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.

⁵⁰ See the comment by Uzbekistan, Comments, p. 15. Carlo Santulli suggests that the article be reformulated as follows: "A State of nationality means a State whose nationality the individual [sought to be protected] has acquired in good faith in accordance with its internal law." ("Travaux de la Commission du droit international," *Annuaire Français de Droit International*, vol. 47 (2001), p. 349 at p. 371.)

⁵¹ Comments, p. 14.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of the former State of nationality and not of the present State of nationality.

31. Article 5 has elicited the most comments and criticisms from States. The main points of criticism relate to the *dies ad quem* (official presentation of the claim) and to paragraph 2. These will be fully examined. However, there are a number of drafting suggestions that should be dealt with first.

32. Austria objects to the phrase "bringing of the claim" in paragraph 2 on the ground that it suggests a judicial procedure, and is thus more limited than the forms of diplomatic protection described in article 1.⁵² It is suggested that the commentary make it clear that such limitation is not intended — if paragraph 2 is retained.

33. The Netherlands suggests that "shall" in paragraph 3 be replaced with "may" because this accords more with the discretionary nature of diplomatic protection.⁵³ In English "may not" is not more discretionary than "shall not", so this suggestion should not be accepted. The Netherlands also suggests, in order to bring article 5 (3) into line with other provisions, that the word "incurred" be replaced with "caused". This seems wise.

34. The United States suggests the insertion of the word "only" in the first line of paragraph 1 — "A State is entitled to exercise diplomatic protection *only* in respect of ..." — to make it clear that the paragraph intends to limit the right to diplomatic protection found in articles 2 and 3 to claims by persons who meet the continuous nationality requirement.⁵⁴ It is recommended that this suggestion be followed.

35. Several States have raised objections to paragraph 2.⁵⁵ The most helpful criticism comes from the United States, which argues that the main purpose of paragraph 2 is to protect a person whose nationality has changed as a result of succession. It questions whether laws mandate a change of nationality in the case of marriage and adoption. Indeed, it might have added that the prohibition on the automatic change of nationality of women in the case of marriage contained in the Convention on the Elimination of All Forms of Discrimination against Women⁵⁶ reduces still further the likelihood of such changes taking place. The United States believes that the right of diplomatic protection passes in State succession, and the right to diplomatically protect in this situation should not be viewed as an exception to the general requirement. Accordingly it suggests that the issue should be addressed through the addition of a reference to the "predecessor State" in article 5 (1). It is recommended that this proposal be adopted.

36. There is virtually no State practice to support a requirement that nationality be retained continuously from the time of injury to the date of presentation or resolution of the claim (see A/CN.4/506/Add.1, paras. 12-16). Yet, as the United States points out,⁵⁷ it is incongruous to draft a rule on continuous nationality that fails to take account of the period between the *dies a quo* and *dies ad quem*. It is

⁵² Comments, p. 15.

⁵³ Comments, p. 16.

⁵⁴ Comments, pp. 17, 18.

⁵⁵ Comments, pp. 15 (El Salvador), 16-17 (Qatar) and 19-20 (United States).

⁵⁶ United Nations Treaty Series, vol. 1249, No. 20378, article 9 (1).

⁵⁷ Comments, pp. 19-20.

suggested that article 5 (1) be adjusted accordingly. This may be an exercise in progressive development but it seems to be one that is justified.

37. The most controversial aspect of the continuous nationality rule concerns the *dies ad quem* — the final date or stage of the proceedings at which the injured individual must still be a national. The Commission has chosen, on the basis of its reading of State practice, the date of the official presentation of the claim. This position is supported by several States.⁵⁸ On the other hand, it is strongly opposed by the United States which argues for the date of the resolution of the claim, that is, the making of the award.⁵⁹

38. The United States relies largely on the decision of an arbitral tribunal of the International Centre for Settlement of Investment Disputes in *The Loewen Group Inc. v. United States of America*, which held that “In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*”.⁶⁰ This decision, it argues, is supported by a number of other arbitral decisions and claims presented through diplomatic channels in which the person on whose behalf the claim was presented changed his/her nationality *after* the claim was officially presented but before the final resolution of the claim. In each of these cases, the international claim was dismissed or withdrawn when it became known that the claim was being asserted on behalf of a national of a State other than the claimant State. The United States claims that these cases reflect a consistent State practice amounting to a customary rule. Moreover, as a policy matter this rule is preferable, as it avoids a situation where the respondent State owes the claimant State for an injury to a person who is no longer the legal concern of that State.

39. Academic opinion is not helpful on this subject. Some writers favour the date of presentation,⁶¹ while others support the date of the resolution of the claim.⁶² Most, however, acknowledge that the *dies ad quem* is uncertain on the ground that there is support for both positions.⁶³ State practice is equally unhelpful, as treaties

⁵⁸ Comments, pp. 15 (Austria and Netherlands) and 16 (Norway, on behalf of the Nordic States).

⁵⁹ Comments, pp. 18-19.

⁶⁰ Case No. ARB(AF)/98/3, 26 June 2003; *International Legal Materials*, vol. 42, No. 4 (July 2003), p. 811, at para. 225.

⁶¹ F. Borchard, *The Diplomatic Protection of Citizens Abroad* (1919), p. 666.

⁶² R. Jennings and A. Watts, (eds.), *Oppenheim's International Law*, 9th ed. (1992), p. 512; C. J. B. Hurst, “Nationality of claims”, *British Yearbook of International Law* (1926), p. 163; F. V. García-Amador et al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974), p. 82.

⁶³ Oppenheim's (note 62 above) qualifies support for the date of the award at p. 512, fn. 6 by stating that in some cases the date of presentation of the claim will suffice. See, further, G. Schwarzenberger, *International Law*, 3rd ed. (1957), vol. 1, p. 597; I. Brownlie, *Principles of Public International Law*, 6th ed. (2003), p. 461; A. H. Feller, *The Mexican Claims Commissions 1923-4* (1935), pp. 86 and 96-97; Judge Jessup, separate opinion, *Barcelona Traction case*, 1970 *I.C.J. Reports*, pp. 202-203; E. Borchard, “The protection of citizens abroad and change of nationality”, *Yale Law Journal*, vol. 20 (1934), p. 359; at pp. 377-378; E. Borchard, “Protection diplomatique des nationaux à l'étranger”, *Annuaire de l'Institut de Droit International*, vol. 36 (1931), pp. 256, 284; C. J. B. Hurst, note 62 above, at pp. 179-180; M. S. Duchesne, “The continuous-nationality-of-claims principle: its historical development and current relevance to investor-state investment disputes”, *George Washington International Law Review*, vol. 36 (2004), p. 783, at pp. 799-802; J. Paulsson, *Denial of Justice in International Law* (2005), p. 183.

differ in their formulation of the *dies ad quem*.⁶⁴ Although the 1930 Hague Conference for the Codification of International Law is often cited in support of the date of the award,⁶⁵ it must be recalled that this "support" is based on a survey of State opinion only, and that of the 20 States that responded to the survey, eight rejected continuous nationality as a rule, three abstained and nine voted in favour (including Great Britain and four of its dominions).⁶⁶

40. Judicial decisions on this subject are also too uncertain to provide evidence of a rule of customary international law. In large part the divergences of judicial opinion may be ascribed to the divergences in treaties regulating such claims. As Umpire Parker stated in *Administrative Decision No. V*:

When the majority decisions in these cases come to be analysed, it is clear that they were in each case controlled by the language of the particular protocol governing the tribunal deciding them, which language limited their jurisdiction to claims possessing the nationality of the nation asserting them not only in origin but continuously — in some instances to the date of the *filing* of the claim, in others to the date of its *presentation* to the tribunal, in others to the date of the *judgment* rendered, and in still others to the date of the *settlement*. This lack of uniformity with respect to the period of continuity of nationality required for jurisdictional purposes results from each case being controlled by the language of the particular convention governing.⁶⁷

In these circumstances it is not surprising that some decisions favour the date of presentation,⁶⁸ some favour the date of the award,⁶⁹ and others are inconclusive.⁷⁰ Significantly, many of the decisions in favour of the date of the resolution of the claim, and on which the United States relies, involve instances in which the national changed his/her nationality after the presentation of the claim and before the award to that of the respondent State. In such a case it could hardly be expected that the claim would succeed, as the respondent State would then be paying compensation to another State in respect of an injury to its own national!⁷¹ This was the case with the

⁶⁴ See the comment of Umpire Parker in *Administrative Decision No. V*, *U.N.R.I.A.A.*, vol. 77, p. 119, at p. 143. See, further, J. H. Ralston, *The Law and Procedure of International Tribunals* (Revised ed. 1926), pp. 164-165; G. H. Hackworth, *Digest of International Law*, vol. 5 (1943), pp. 807-808.

⁶⁵ See *Eschazier* (Great Britain v. Mexico), *U.N.R.I.A.A.*, vol. 5, p. 207, at pp. 210-211.

⁶⁶ For a history of this survey of opinion, see Duchesne, note 62 above, pp. 794-797.

⁶⁷ *U.N.R.I.A.A.*, vol. 7, p. 199, at p. 143.

⁶⁸ *Case of Captain W. H. Gleadell* (Great Britain v. Mexico), reported in G. H. Hackworth, *Digest of International Law*, vol. 5 (1943), p. 805; *Case of F. W. Flack* (Great Britain v. Mexico), reported in A. H. Feller, *The Mexican Claims Commissions 1923-4* (1935), p. 96.

⁶⁹ *Eschazier* (Great Britain v. Mexico), *U.N.R.I.A.A.*, vol. 5 (1931), p. 207; *Benchiton case* (Great Britain v. Spain), *U.N.R.I.A.A.*, vol. 2 (1924), p. 615 (translations in 1923-1924 Annual Digest of Public International Law Cases, p. 189); *Guadalupe* (unpublished), reported in A. H. Feller, *The Mexican Claims Commissions 1923-4* (1935), p. 97; *Loewen Group Inc v. USA* (2003) 42 ILM 1811, para. 225.

⁷⁰ *Exors of F. Lederer v. German Government*, *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, vol. 3, p. 762 (largely a question of treaty interpretation); *Hawaiian Claims* reported in F. K. Nielson, *American and British Claims Arbitration* (1926), p. 30 (claims withdrawn); *Chopin, French and American Claims Commission, 1880-1884*, vol. 60, Records of Claims (claim withdrawn); *Case of M. and T. Gennes* reported in J. H. Ralston, *The Law and Procedure of International Tribunals* (Revised ed. 1926), p. 165; *Kren Claim*, 20 I.L.R. (1953), p. 234.

⁷¹ See the comment to this effect by the United States Supreme Court in *Burthe v. Dent*, 133 U.S. (1890), p. 514, at pp. 520-521.

Ebenzer Barston,⁷² the claim of the executors of *F. Lederer*,⁷³ the *Hawaiian Claims*,⁷⁴ *Chopin*,⁷⁵ *Gribble*,⁷⁶ and, of course, *Loewen*.⁷⁷

41. The United States relies largely on the decision in *Loewen*, but this decision — on this aspect of the case — is seriously flawed. While most of the decision is carefully reasoned and researched (for instance on local remedies), the crucial issue before the tribunal, that of the *dies ad quem*, is disposed of in a manner which gives no indication that the tribunal applied its mind to the matter at all. It simply asserts, without any examination whatsoever of authority (despite the fact that counsel referred the tribunal to the relevant authorities), that under customary international law “there must be continuous national identity from the date of the events giving rise to the claim ... through to the date of the resolution of the claim.”⁷⁸ The tribunal notes that “the International Law Commission issued a report which proposed eliminating the continuous nationality rule even in cases of diplomatic protection”, that “the report itself met with criticism in many quarters”; and that “the [International Law Commission] is far from approving any recodification based on the report”.⁷⁹ Had the tribunal read the report (A/CN.4/506/Add.1, paras. 12-16), it would have been aware of the dispute over the *dies ad quem*, which features prominently in the report. Moreover, had it, before giving judgment on 26 June 2003, enquired about the work of the Commission on this subject, it would have learned that in 2002 the Commission had adopted a draft article on continuous nationality which gives approval to the date of the official presentation of the claim as the *dies ad quem*.⁸⁰ But it made no attempt to do so. Had the tribunal taken the trouble to find out about the controversy surrounding the *dies ad quem* in continuous nationality, it is not unlikely that it would have sought to fashion a more restrictive rule and one that took account of the facts before it — namely a rule that confined itself to making it impossible for a State to present a claim on behalf of a national where that national, subsequent to the filing of the claim, had acquired the nationality of the respondent State.

42. *Loewen* has, rightly, been vigorously criticized. Jan Paulsson states that

The tribunal’s treatment of the continuous nationality issue, considering its outcome — determinative effect — was startling in its succinctness ...⁸¹

There is nothing in the award to indicate that the arbitrators had considered the special addendum on “continuous nationality and the transferability of claims” prepared by the ILC’s rapporteur on diplomatic protection, Professor Dugard, in early 2000. They wrote only that *Loewen* had *contended* such a report had been issued, and had encountered some criticism. But anyone who reads the report would see that Dugard’s extensive review of

⁷² G. H. Hackworth, *Digest of International Law*, vol. 5 (1943) p. 805.

⁷³ 3 *Recueil des Decisions des Tribunaux Arbitraux Mixtes* 763.

⁷⁴ See F. K. Nielson, *America and British Claims Arbitration* (1926), p. 30.

⁷⁵ *French and American Claims Commission, 1880-1884*, vol. 60, Records of Claims.

⁷⁶ Report of Robert S. Hale Esq. [1873, Part II, vol. III] U.S. Foreign Relations 14 (1874).

⁷⁷ Note 60 above, at para. 225.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, para. 236.

⁸⁰ *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10)*, para. 280.

⁸¹ J. Paulsson, “Continuous nationality in *Loewen*”, *Arbitration International*, vol. 20 (2004), p. 213, at p. 214.

the authorities led him to conclude that there was no established rule in this area. The *dies ad quem* requirement which commended itself to the *Loewen* arbitrators was perhaps the least plausible of a long series of alternative candidates ...

These included: (i) the date on which a government endorses the claim of a national; (ii) the date of initial diplomatic negotiations; (iii) the date of filing the claim; (iv) the date of signature of the treaty referring to the relevant forum; (v) the date of ratification of said treaty; (vi) the date of its entry into force; (vii) the date of presentation of the claim ...; (viii) the date of conclusion of the oral hearings; (ix) the date of judgment (i.e. the *Loewen* solution); and (x) the most extreme, the date of settlement.

Without any indication of being aware of it, the *Loewen* arbitrators adopted the reasoning in the case of *Minnie Stevens Eschautier (Great Britain v. US)*, 24 June 1931, V RIAA 207; whose claim was rejected because she lost her British nationality by marriage to an American between the date of conclusion of the oral hearing and the judgment. As the Umpire (Edwin P. Parker) noted in the far more influential *Administrative Decision No. V (US v. Germany)*, 31 October 1924, VII RIAA 119: (A) the acquisition of nationality transfers allegiance but does not transport existing State obligations and, (B) at any rate, most of the decisions depend on the *lex specialis* of the relevant treaty and therefore do not reflect a general principle; it may well be doubted whether the alleged rule [of continuous nationality] has received such universal recognition as to justify the broad statement that it is an established rule of international law ...⁸²

M. S. Duchesne, in similar vein, contends that "there is good reason to discount the weight" of *Loewen*. He continues:

Whatever other reaction the *Loewen* tribunal's decision might invite, its discussion on the continuous nationality "rule" was, if not cursory, then at least conclusory ... the tribunal's discussion of the continuous nationality issue simply asserts the existence of a rule without citation or even discussion. The tribunal goes so far as to assert: "There is only *limited* dispute as to the history of the requirement of continuous nationality *to the end* of any international proceeding." But ... even those authorities who support treaty continuous nationality as a "rule" have acknowledged that there is much confusion, and little consensus, concerning the point to which original nationality must be maintained. The *Loewen* tribunal's failure to acknowledge, much less deal with, the contrary authority, particularly after substantial briefing by the disputing parties and a full oral hearing on the issue, strongly suggests that ... it approached the issue with a preconceived notion of customary international law and felt little need to put that notion to the test of careful examination.⁸³

In these circumstances it is small wonder that the Netherlands "considers that it is not clear whether the *Loewen* case truly reflects the law as it currently stands"⁸⁴

⁸² J. Paulsson, *Denial of Justice in International Law* (2005), pp. 183-184.

⁸³ "The continuous-nationality-of-claims principle", *George Washington International Law Review*, vol. 36 (2004), p. 783, at p. 808. The reader should be aware that the author was involved in the *Loewen* case.

⁸⁴ Comments, p. 16.

43. In the light of the uncertainty surrounding the *dies ad quem* the Commission is required to make a choice between the date of the official presentation of the claim and the date of the resolution of the claim. The authorities are inconclusive and the response of States, while small, favours the date of the presentation of the claim. In these circumstances the Commission must be guided by principle and policy in the exercise of its choice. Principle supports the date of the presentation of the claim as this most favours the interests of the individual. So too does policy, if we equate policy with fairness. Many years may pass between the presentation of a claim and its final resolution and it is unfair to deny the individual the right to change nationality, through marriage or naturalization, during this period. Moreover, the date of presentation is significant as it is the date on which the State of nationality shows its clear intention to exercise diplomatic protection — a fact that was hitherto uncertain. Perhaps the strongest statement on policy is to be found in the *Eschauzier* case (on which the United States relies for its position):

It might be argued that international jurisdiction would be rendered considerably more complicated if the tribunal had to take into account changes supervening during the period between the filing of the claim and the date of the award. Those changes may be numerous and may even annul one another. Naturalizations may be applied for, and obtained, and may be voluntarily lost. Marriages may be concluded and dissolved. In a majority of cases, changes in identity or nationality will escape the knowledge of the tribunal, and often of the Agents as well. It will be extremely difficult, even when possible, to ascertain whether at the time of the decision all personal elements continue to be identical to those which existed when the claim was presented. Jurisdiction would undoubtedly be simplified if the date of filing were accepted as decisive, without any of the events that may very frequently occur subsequently to that date, having to be traced up to the date of rendering judgment. It can therefore not be a matter for surprise that both *Borchard* (pages 664 and 666), and *Ralston* (section 293), state that a long course of arbitral decisions has established that a claim must have remained continuously in the hands of a citizen of the claimant Government, until the time of its presentation.⁸⁵

44. Different policy considerations apply where the national on whose behalf the claim is brought acquires the nationality of the respondent State after the presentation of the claim as occurred in *Loewen* and many of the cases on which the United States relies. In such circumstances fairness dictates that the date of the award be selected as *dies ad quem*, as the contrary position would, in the words of *Loewen*, "produce a result so unjust that it could be sustained only by irrefutable logic or compelling precedent, and neither exists".⁸⁶

45. It is therefore proposed that the Commission retain the official date of presentation of the claim as the *dies ad quem* for the continuous nationality rule but that an exception be made for the case in which the national on whose behalf the claim is brought acquires the nationality of the respondent State after the presentation of the claim. Here the date of the resolution of the claim is the *dies ad quem*.

⁸⁵ *U.N.R.I.A.A.*, vol. 5, p. 207, at p. 209.

⁸⁶ *International Legal Materials*, vol. 42, No. 4 (July 2003), p. 848, para. 232.

46. It may be argued that article 5 (3) is superfluous in the light of the discarding of article 5 (2). On the other hand, it is suggested that it may have relevance in the case of change of nationality arising from the succession of States. For this reason it is retained.

47. It is proposed that article 5 should read:

(1) A State is entitled to exercise diplomatic protection *only* in respect of a person who was a national of that State, or any predecessor State, continuously from the date of injury to the date of the official presentation of the claim.

(2) A State is not entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the presentation of the claim.

(3) Diplomatic protection may not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.

6. Article 6

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

48. Austria comments that there is no need for paragraph 2 "as there is certainly no doubt that two or more States may jointly act when exercising the right of diplomatic protection". Even if such a clause is omitted "the State to which the claim is presented must accept such a joint démarche".⁸⁷ Austria warns that this paragraph will inevitably raise difficult questions about how joint actions are to be conducted or which State is to enjoy priority in bringing a claim. The correctness of its warning is borne out by the comments made by El Salvador, Guatemala, Qatar and Uzbekistan.⁸⁸ In these circumstances it seems best to retain only paragraph 1 of article 6.

7. Article 7

Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.

⁸⁷ Comments, p. 21.

⁸⁸ Comments, pp. 21-22.

49. This provision has elicited little criticism from either scholars⁸⁹ or States. Austria and Norway (on behalf of the Nordic States) welcome it.⁹⁰ Whereas some States question it as a rule of customary international law,⁹¹ Norway states that it "constitutes a codification of existing customary international law".⁹² Some States insist on clarification of the term "predominant",⁹³ which is explained in the commentary, while Morocco prefers the term "effective" to "predominant".⁹⁴ The Commission has, however, made it clear, in the commentary, that it prefers the term "predominant" as it conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another.⁹⁵

It is suggested that article 7 be retained in its present form.

8. Article 8

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

50. There is general support, of varying degrees, for article 8, which is a clear exercise in progressive development.⁹⁶ As it is progressive development it is wise to be cautious, perhaps strict, in prescribing conditions for the exercise of diplomatic protection. Thus it is recommended that the Commission should not follow the suggestion of Austria that a refugee qualify for diplomatic protection if, after recognition as a refugee in one European State, he/she assumes lawful residence in another European State.⁹⁷ For the same reason it is recommended that the Nordic proposal⁹⁸ that "lawful and habitual" residence as a requirement be replaced with "lawfully staying" not be followed. Conversely, Uzbekistan's proposal⁹⁹ that

⁸⁹ Cf. C. Santulli, "Travaux de la Commission du droit international", *Annuaire Français de Droit International* (2001), pp. 369-378.

⁹⁰ Comments, pp. 22-23.

⁹¹ Qatar (Comments, p. 23) and possibly Morocco (Comments, p. 23).

⁹² Comments, p. 23.

⁹³ El Salvador (Comments, p. 22), Uzbekistan (Comments, p. 23).

⁹⁴ Comments, p. 23.

⁹⁵ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10)*, para. 60, commentary to draft article 7, para. (5).

⁹⁶ The United States requests (Comments, p. 51) that it be made clear that this is an exercise in progressive development. This is done in paragraph (2) of the commentary. (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10)*, para. 60, commentary to draft article 8).

⁹⁷ Comments, p. 24.

⁹⁸ Comments, p. 26.

⁹⁹ Comments, p. 26. Uzbekistan's other suggestion that "and has been granted asylum" be added after "as a refugee" in para. 2 is unnecessary to consider as this issue is already covered by the requirement of recognition as a refugee contained in para. 2.

"lawful and permanent residence" be required goes too far in the other direction and should not be accepted.

51. There is a dispute over the Commission's decision to adopt a flexible approach to the meaning of "refugee" and not to confine it to refugees as defined in the 1951 Convention Relating to the Status of Refugees.¹⁰⁰ Austria argues that one cannot expect a respondent State to accept a claim for diplomatic protection on behalf of a person characterized as a refugee by the claimant State without strict regard for the international definition.¹⁰¹ The Nordic States, on the other hand, argue "that a State may exercise diplomatic protection on behalf of persons fulfilling the requirements of territorial connection to the State exercising diplomatic protection, and which in that State's judgement clearly is in need of protection without necessarily formally qualifying for status as a refugee".¹⁰² Although this matter concerns the commentary rather than the formulation of article 8, it is an important matter of principle. The Nordic States see the subject entirely from the perspective of the claimant State, while Austria, wisely, warns that the respondent State may refuse to recognize the right of a State to exercise diplomatic protection on behalf of a refugee who does not strictly qualify as a refugee. The Special Rapporteur would appreciate guidance on this subject from the Commission.

9. Article 9

State of nationality of a corporation

For the purposes of diplomatic protection of corporations, the State of nationality means the State under whose law the corporation was formed and in whose territory it has its registered office or the seat of its management or some similar connection.

52. The comments on the provision raise two important issues. First, the final phrase "or some similar connection" may be interpreted as requiring a genuine link between the corporation and the State exercising diplomatic protection. Secondly, there is the problem of the corporation "formed" (incorporated) in one State but with a registered office in another State. Which State may exercise diplomatic protection?

53. In its commentary on article 9 the Commission states that "the registered office, seat of management or 'some similar connection' should not ... be seen as forms of a genuine link". The phrase "or some similar connection" must be read in the context of the "registered office or the seat of its management", in accordance with the *ejusdem generis* rule of interpretation, which requires a general phrase of this kind to be interpreted narrowly to accord with the phrases that precede it. This means that the phrase is to have no life of its own. It must refer to some connection similar to that of "registered office" or "seat of management".¹⁰³ Despite this explanation it seems certain that the phrase "or some similar connection" will be construed as requiring some form of genuine link. This is demonstrated by the

¹⁰⁰ See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 8, para. (8).

¹⁰¹ Comments, p. 24. See, too, Comments, pp. 24 (El Salvador) and 26 (Qatar).

¹⁰² Comments, p. 25.

¹⁰³ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 9, paras. (5) and (6).

comments of Austria, the Netherlands and Qatar.¹⁰⁴ It is recommended that the phrase be deleted, as no amount of explaining in the commentary will succeed in preventing it from being read as synonymous with the requirement of a genuine link.

54. Several States raise the question of whether a State may be diplomatically protected if it has its registered office in a State other than that in which it is formed (incorporated).¹⁰⁵ This is a fair question, as the present language of article 9 suggests that only the State in which the corporation is formed *and* in whose territory it has "its registered office or the seat of its management or some similar connection" may exercise diplomatic protection. This interpretation is confirmed by the fact that article 9 speaks of "*the* State of nationality" and paragraph (7) of the commentary states that "This language is used to avoid any suggestion that a corporation might have dual nationality". This is an error that must be rectified. As the Netherlands rightly points out,¹⁰⁶ corporations are often formed in more than one State and have registered offices in more than one State. This is a fact of commercial life that cannot be ignored or wished away. It is suggested that article 9 requires a substantial revision; and it is suggested that Guatemala's proposal might provide the solution.¹⁰⁷ This would require recognition of the possibility of dual nationality of corporations and adoption of the test of "closest connection", "effective nationality" or "predominant nationality" (to accord with article 7) as an indication of which State may exercise diplomatic protection. (Guatemala's suggestion that it should be made clear that the term "corporation" means "limited liability company" is already taken care of in paragraph (2) of the commentary.)

55. It is proposed that article 9 be amended to read:

- (1) *A State is entitled to exercise diplomatic protection in respect of an injury to a corporation which has the nationality of that State.*
- (2) *For the purposes of diplomatic protection of corporations, a corporation has the nationality of the State under whose law the corporation was formed or in whose territory it has its registered office or the seat of its management.*
- (3) *When two States are entitled to exercise diplomatic protection in terms of paragraph 2, the State whose nationality is predominant shall exercise that protection.*

10. Article 10

Continuous nationality of a corporation

1. **A State is entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and is its national at the date of the official presentation of the claim.**
2. **Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury, has ceased to exist according to the law of that State.**

¹⁰⁴ Comments, pp. 27 and 29.

¹⁰⁵ Comments, pp. 27 (El Salvador), 28 (Guatemala) and 29 (Morocco and the Netherlands).

¹⁰⁶ Comments, p. 29.

¹⁰⁷ Comments, p. 28.

56. The continuous nationality rule has already been dealt with exhaustively in respect of article 5. It is therefore unnecessary to rehearse the arguments in favour of amending paragraph 1 to include the words "only" and "continuously" and to provide for the case of the predecessor State.¹⁰⁸ Nor is it necessary to repeat the arguments in favour of retaining the date of the official presentation of the claim as the *dies ad quem* except where the national sought to be protected acquires the nationality of the respondent State after the presentation of the claim.

57. The United States, however, objects to paragraph 2 of article 10¹⁰⁹ arguing that the protection of extinct corporations should not be an exception to the rule of continuous nationality. It claims that "a State may continue to exercise protection with respect to the claims of a corporation so long as the corporation retains a legal personality, which can be as bare as the right to sue or be sued under municipal law. Many municipal systems allow for corporations to continue to raise and defend claims that arose during corporate life for a finite period of time after dissolution, meaning that legal personality persists until this period expires. Thus, the problem of espousing claims of extinct corporations would arise infrequently, as the vast majority of claims can be considered while the corporation maintains a legal personality".¹¹⁰ It adds that sound policy considerations in municipal law allow the legal personality of corporations to lapse: "Municipal survival and corporate wind-up statutes include a finite wind-up period to allow those involved with a corporation to obtain the benefits of finality, knowing that after the wind-up period has ended claims for and against the corporation will cease".¹¹¹ In support of its argument the United States refers to laws in the United States, the United Kingdom, Canada and France which allow corporations to sue and be sued for several years following dissolution.

58. Unfortunately, the United States fails to consider the concerns raised in this connection by judges (notably the American judge, Judge Jessup in *Barcelona Traction*¹¹²), tribunals and scholars, referred to in the commentary and the fourth report on diplomatic protection.¹¹³ In the light of the failure to refute (or even to consider) these authorities, and in the absence of a wider comparative survey of corporate law and practice to establish that many legal systems allow corporations to sue and be sued following dissolution, the inclination of the Special Rapporteur is to retain paragraph 2, albeit *ex abundanti cautela*.

59. The revised article 10 should therefore read:

- (1) A State is entitled to exercise diplomatic protection *only* in respect of a corporation that was a national of that State, or any predecessor State, continuously from the date of injury to the date of the official presentation of the claim.

¹⁰⁸ The concerns of Austria (Comments, p. 30) that article 10 does not provide for the case of State succession are met by the inclusion of reference to the "predecessor State".

¹⁰⁹ Comments, pp. 30-31.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² 1970 I.C.J. Reports, p. 193. See also the opinions of Judges Gros (p. 277) and Fitzmaurice (pp. 101-102) and Judge ad hoc Riphagen (p. 345).

¹¹³ Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10), para. 60, commentary to draft article 10, para. (4), notes 102-104 and A/CN.4.530, paras. 93-105.

(2) *A State is not entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.*

(3) Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury, has ceased to exist according to the law of that State.

11. Article 11

Protection of shareholders

The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless:

(a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or

(b) The corporation had, at the time of the injury, the nationality of the State alleged to be responsible for causing injury, and incorporation under the law of the latter State was required by it as a precondition for doing business there.

60. Article 11, subparagraph (a), seeks to give effect to the *dictum* in *Barcelona Traction* in which the International Court of Justice acknowledged the existence of an exception to the general rule that only the State of incorporation may protect a corporation (and its shareholders) where the company has ceased to exist.¹¹⁴ The Commission restricted the scope of this exception by requiring that the corporation must have ceased to exist "for a reason unrelated to the injury." Austria rightly points out that this restriction "makes very little sense, since the State where the company is terminated differs from the injuring State".¹¹⁵ The Special Rapporteur shares this view and suggests that this phrase be deleted.

61. Austria's further suggestion that article 11, subparagraph (a), be amended to read "State of nationality" instead of "State of incorporation"¹¹⁶ cannot be accepted as it is intended to emphasize that the law of the State of incorporation is to govern. This will usually be the same as the State of nationality but need not always be so in the light of the proposed revision of article 9.

62. The United States proposes that article 11, subparagraph (a), be deleted because it creates the anomalous situation of granting States of shareholders a greater right to espouse claims of a corporation than the State of incorporation itself.¹¹⁷ It states that the commentary provides no justification for such an exception. However, the United States fails to consider the reasoning of the International Court of Justice in *Barcelona Traction* in favour of such an exception.¹¹⁸ Article 11 aims to codify the law as set out in *Barcelona Traction*, for

¹¹⁴ 1970 *I.C.J. Reports*, pp. 41-42 (paras. 64-68).

¹¹⁵ Comments, p. 52.

¹¹⁶ *Ibid.*

¹¹⁷ Comments, p. 53.

¹¹⁸ 1970 *I.C.J. Reports*, pp. 41-42 (paras. 64-68).

which it has been congratulated by other States.¹¹⁹ In these circumstances it is suggested that article 11, subparagraph (a), be retained, subject to the deletion suggested by Austria.

63. The United States objects to article 11, subparagraph (b), on grounds of law and public policy. As to the law, it argues that the cases on which the Commission relies as evidence for this exception are based on "special agreement between two States granting a right to shareholders to claim compensation, or an agreement between the injuring State and its national corporation granting compensation to the shareholders. As a result of those agreements, the abovementioned cases provide little support for the existence of a customary international law rule allowing States to espouse claims of shareholders against the State of incorporation where incorporation was mandated for doing business in the State."¹²⁰ On the subject of policy, the United States claims: "this exception would create a regime where shareholders of corporations incorporated in a State have greater rights to seek diplomatic protection of their claims in that State than shareholders of foreign-owned corporations, who would have to rely on the corporation's State to pursue claims. It is not clear that such a result is just."¹²¹

64. The Special Rapporteur finds himself unable to agree with the above criticisms for the following reasons:

(a) The fact that the cases relied on for this exception are based on special agreements does not deprive them of value in the law-formation process. The twin requirements for the creation of a customary rule are *usus* and *opinio juris*. The settlement of claims by special agreement between the State of incorporation and the State of nationality of the shareholders provides evidence both of State practice (*usus*) and of a sense of obligation on the part of the respondent State to settle the claim (*opinio juris*).

(b) The United States fails to consider the wealth of judicial opinion in favour of such an exception. For example, the separate opinions of judges Wellington, Koo,¹²² Jessup,¹²³ Tanaka¹²⁴ and Fitzmaurice¹²⁵ in *Barcelona Traction*. Nor does it consider whether the ELSI case¹²⁶ lends support to the exception as suggested in the commentary¹²⁷ and the fourth report.¹²⁸

(c) Although doctrine is divided on this subject, there is considerable support for the proposed exception.

(d) Draft articles 9, 11 and 12 seek to codify the law expounded by the International Court of Justice in *Barcelona Traction*. This exception is part of the principles on this subject expounded by the Court.

¹¹⁹ Comments, pp. 32 (Nordic States) and 34 (the Netherlands).

¹²⁰ Comments, pp. 34-35.

¹²¹ Comments, p. 35.

¹²² Preliminary objections, 1964 *I.C.J. Reports*, p. 58, para. 20.

¹²³ 1970 *I.C.J. Reports*, pp. 191-193.

¹²⁴ *Ibid.*, p. 134.

¹²⁵ *Ibid.*, pp. 72-75.

¹²⁶ 1989 *I.C.J. Reports*, p. 15.

¹²⁷ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10)*, para. 60, commentary to draft article 11, para. (10).

¹²⁸ A/CN.4/530, paras. 81 and 82.

(e) The United States submission is, possibly, weakest in respect of policy. As Norway states (on behalf of the Nordic countries):

A State should not be allowed to require foreign interests to incorporate under local law as a condition for doing business in that State and then plead such incorporation as the justification for rejecting the exercise of diplomatic protection from the State of nationality of the foreign interests.¹²⁹

This echoes the reply of the United Kingdom to the Mexican argument in *Mexican Eagle* that a State (*in casu* the United Kingdom) might not intervene on behalf of its shareholders in a Mexican company.

If the doctrine were admitted that a Government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad.¹³⁰

A company compelled to incorporate in a State as a precondition for doing business there has been described as a "Calvo corporation" as incorporation protects the host State as firmly as the Calvo clause. Hence the comment of the Netherlands that "the State of nationality of the shareholder in cases of Calvo [corporations] would be entitled to exercise diplomatic protection".¹³¹ Policy considerations of this kind are more powerful than those raised by the United States.

(f) A final weakness in the United States position is that it makes no attempt to distinguish between corporations that freely and voluntarily incorporate in a State and those that are compelled to incorporate in such State as a result of law or political pressure. This distinction, which is central to article 11, subparagraph (b),¹³² is not considered by the United States.

65. The Special Rapporteur has been guided in his formulation of the present draft articles largely by State practice, judicial decisions and general principles. On article 11, subparagraph (b), he has been strongly influenced in favour of such an exception by United States practice (*Delagoa Bay Railway Co.*,¹³³ *El Triunfo* (1902)¹³⁴), judicial decisions involving the United States (*ELSI case*)¹³⁵), judicial opinion (Judge Jessup in *Barcelona Traction*)¹³⁶) and general principles (opposition to Calvo clause and "Calvo corporation"). He therefore finds it strange that the United States should denounce an exception which is so strongly supported by American authority. In summary, it is suggested that the reasons advanced for the deletion of article 11, subparagraph (b), are unconvincing and that it should be retained.

¹²⁹ Comments, p. 34.

¹³⁰ M. Whiteman, *Digest of International Law*, vol. 8, pp. 1273-1274.

¹³¹ Comments, p. 34.

¹³² See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10)*, para. 60, commentary to draft article 11, para. (8).

¹³³ J. B. Moore, *Digest of International Law*, vol. 6 (1906), p. 647.

¹³⁴ *U.N.R.I.A.A.*, vol. 15 (1991), p. 467.

¹³⁵ 1989 *I.C.J. Reports*, p. 15.

¹³⁶ 1970 *I.C.J. Reports*, pp. 193-193.

66. The Nordic States object to the requirement in article 11, subparagraph (b), that, in order to succeed in the exception it must be shown that incorporation "under the law" of the wrongdoing State was required as a precondition for doing business there. It suggests that "there are ... as a part of the progressive development of international law, good reasons to extend this exception also to cases where the requirement of incorporation is not a formal one, but follows from pressure of informal or political nature on the foreign interests".¹³⁷ The Nordics suggest that this matter be dealt with in the commentary. It is, however, recommended that it be dealt with in the text of article 11, subparagraph (b), itself. In most instances, the Government will place political pressure on foreign investors to incorporate in the host States without the backing of local law. Inevitably such pressure will be as effective as the letter of the law.

67. Suggestions by the Netherlands¹³⁸ in favour of consistency of language and by Austria¹³⁹ for an explanation of the meaning of "injury" in the context of article 11, subparagraph (b), in the commentary, should be acceded to.

68. It is proposed that article 11 be revised to read

The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless

(a) The corporation has ceased to exist according to the law of the State of incorporation [for a reason unrelated to the injury]; or

(b) The corporation had, at the time of the injury, the nationality of the State alleged to be responsible for causing *the* injury, and incorporation [under the law of the latter State] was required by it as a precondition for doing business there.

12. Article 12

Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

69. The United States suggests that this provision is superfluous, as the rights of shareholders are already covered by articles 2 and 3.¹⁴⁰ This is correct. However, if the draft articles are to fully codify the principles expounded in *Barcelona Traction*¹⁴¹ it should be retained. A further advantage of retaining it is that the commentary to this provision ensures that the commentaries ... and the draft articles on the protection of corporations and shareholders ... provide a comprehensive picture of the law on this aspect of diplomatic protection. The Special Rapporteur makes no recommendation to the Commission on this subject, but expresses a mild preference for retention.

¹³⁷ Comments, p. 34.

¹³⁸ Comments, p. 34.

¹³⁹ Comments, p. 33.

¹⁴⁰ Comments, p. 35.

¹⁴¹ 1970 *I.C.J. Reports*, p. 36, paras. 46-47.

13. Article 13

Other legal persons

The principles contained in draft articles 9 and 10 in respect of corporations shall be applicable, as appropriate, to the diplomatic protection of other legal persons.

70. Article 13 is intended to extend the principles relating to the diplomatic protection of corporations to other legal persons. It is not intended that such other legal persons include natural persons.¹⁴² On the other hand, as pointed out by Guatemala,¹⁴³ legal persons or companies other than corporations (that is profit-making enterprises with limited liability whose capital is represented by shares) may have shareholders who are liable for the company's debts up to but not exceeding the level of their equity contribution. The principles covered in articles 11 and 12 are applicable to them. Consequently, the reference to articles 9 and 10 should be extended to include articles 9 to 12. The Special Rapporteur fails to understand why the independence of non-governmental organizations would be compromised by diplomatic protection, as suggested by Qatar.¹⁴⁴

71. Article 13 should therefore be revised to read:

The principles contained in draft articles 9 to 12 in respect of corporations shall be applicable, as appropriate, to the diplomatic protection of other legal persons.

14. Article 14

Exhaustion of local remedies

1. A State may not bring an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 16, exhausted all local remedies.

2. "Local remedies" means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

72. Apart from suggestions relating to the redrafting of the commentary by the Netherlands,¹⁴⁵ the only comment affecting article 14, paragraph (1), is raised by the United States. It points out that in the *ELSI* case the International Court of Justice "acknowledged that a claim could be exhausted for international law purposes when the essence of the claim was considered by municipal tribunals, irrespective of whether the same person or entity pursued the municipal claim as was being diplomatically protected".¹⁴⁶ It accordingly suggests that paragraph 1 be reformulated to exclude the requirement that the injured person be the party

¹⁴² Cf. the suggestion to this effect by El Salvador (Comments, p. 36).

¹⁴³ Comments, p. 36.

¹⁴⁴ Ibid.

¹⁴⁵ Comments, p. 37.

¹⁴⁶ Comments, p. 38. For its position under human rights treaties, see H. G. Schermers,

"Exhaustion of local remedies" in N. Ando et al. (eds.), *Libor Amicorum Judge Shigeru Oda* (2002), p. 947 at pp. 954-958.

exhausting local remedies. The Special Rapporteur is indebted to the United States for this helpful suggestion which is accordingly recommended to the Commission.

73. The Netherlands has suggested a minor amendment to paragraph (2) to bring it into line with article 11, subparagraph (b).¹⁴⁷

74. It is proposed that article 14 be revised to read:

1. *A State may not bring an international claim in respect of an injury to a national or other person referred to in draft article 8 before local remedies have been exhausted, subject to draft article 16.*

2. "Local remedies" means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.

15. Article 15

Category of claims

Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

75. The decision of the International Court of Justice in *Avena*¹⁴⁸ adds considerably to the law on the distinction between direct and indirect injuries in the context of the exhaustion of local remedies rule, but it does not affect the validity of the formulation of the principle contained in article 15. Obviously, it will require discussion in the commentary. Austria raises a question about the title of article 15. "Mixed claims" might be a more appropriate title. No change is recommended to article 15 itself.

16. Article 16

Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(a) The local remedies provide no reasonable possibility of effective redress;

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) There is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable;

(d) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

¹⁴⁷ Comments, p. 34.

¹⁴⁸ (Mexico v. U.S.), 2004 *I.C.J. Reports*, p. 12, particularly at para. 40. See also the separate opinions of Judges Parra-Aranguren (paras. 27-28) and Vereshchetin (paras. 7-11). See, further, A. Künzli, "Case concerning Mexican nationals" (2005), *Leiden Journal of International Law*, vol. 18; and E. Milano "Diplomatic Protection and Human Rights before the I.C.J.", *Netherlands*

76. Mexico makes two general comments on article 16.¹⁴⁹ First, it draws attention to the exception to the exhaustion of local remedies rule in the case of a likely repetition of the injury. Although this exception receives separate attention by Amerasinghe¹⁵⁰ it seems to be covered by subparagraph (a) and will be dealt with in the commentary to subparagraph (a). Mexico also proposes that a provision be included on the burden of proof in respect of the local remedies rule. It will be recalled that the Commission decided not to include such a provision.¹⁵¹ It may, however, be wise to deal with this matter in the commentary.

Subparagraph (a)

77. It will be recalled that when the Commission debated subparagraph (a) it had three options before it: obvious futility, no reasonable prospect of success, and no reasonable possibility of effective redress.¹⁵² It showed a preference for the third option, which now features in subparagraph (a). The United States¹⁵³ calls upon the Commission to reconsider its decision and to adopt the futility rule on the ground that it more accurately reflects customary international law¹⁵⁴ and is supported by policy considerations which require that "in all but the most extreme circumstances a State has the opportunity to rectify within its own legal system violations of international law".¹⁵⁵ The United States therefore proposes the following provision:

Local remedies do not need to be exhausted where the local remedies are obviously futile or manifestly ineffective. Exhaustion of local remedies is not obviously futile or manifestly ineffective where a forum was reasonably available to provide effective redress.

While the Special Rapporteur does not favour the reopening of issues that have already been decided, it must be recalled that the futility rule did enjoy some support in the Commission. It is therefore suggested that the Commission reconsider this matter. However, it should be aware of the arguments raised against the futility rule referred to in the commentary¹⁵⁶ and the third report (A/CN.4/523, paras. 18-38). As shown in the third report, the "obvious futility" test, first expounded in the *Finnish Ships Arbitration*,¹⁵⁷ was not followed in the *ELSI* case,¹⁵⁸ and has been criticized by writers.¹⁵⁹ The main objection to this test is that it suggests that the

¹⁴⁹ *Treaty of International Law*, vol. 35 (2004), p. 85, at pp. 128-130.

¹⁵⁰ Comments, pp. 40-41.

¹⁵¹ *Local Remedies in International Law*, 2nd ed. (2004), p. 212.

¹⁵² *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10)*, para. 252.

¹⁵³ *Ibid.*, para. 178.

¹⁵⁴ Comments, pp. 41-43.

¹⁵⁵ See Amerasinghe, note 150 above, p. 206: "The test is obvious futility or manifest ineffectiveness, not the absence of a reasonable prospect of success or the improbability of success, which are both less strict tests."

¹⁵⁶ Comments, p. 43.

¹⁵⁷ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10)*, para. 60, commentary to draft article 16, paras. (2) and (3).

¹⁵⁸ *E.S.R.I.A.A.*, vol. 3 (1934), p. 1479 at p. 1504.

¹⁵⁹ 1989 *I.C.J. Reports*, p. 14, at pp. 46-47 (paras. 59, 62).

¹⁶⁰ C. F. Amerasinghe, "The local remedies rule in appropriate perspective", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 36 (1976), p. 726, at p. 752; G. Simpson and H. Fox, *International Arbitrations* (1959), p. 114; D. Mummery, "The content of the duty to exhaust local remedies", 58 *A.J.I.L.* (1964), p. 389, at p. 401.

ineffectiveness of the local remedy must be *ex facie* "immediately apparent". In order to overcome this, Sir Hersch Lauterpacht suggested introducing the element of "reasonableness" into the test,¹⁶⁰ which allows a court to examine whether, in the circumstances of the particular case, an effective remedy was a reasonable possibility. This was the text preferred by the Commission in 2002 and one that is still advocated by the Special Rapporteur.

78. Should the Commission decide not to accept the proposal of the United States, it should consider the Austrian proposal to insert the word "available" into subparagraph (a) to bring it into line with article 44¹⁶¹ of the draft articles on responsibility of States for internationally wrongful acts.¹⁶²

Subparagraph (c)

79. Two very different proposals are made in respect of subparagraph (c). Austria proposes that the first part of the paragraph be dropped and that it be confined to the situation where the circumstances of the case make the exhaustion of local remedies unreasonable.¹⁶³ The United States, on the other hand, proposes that only the first part of the paragraph be retained and that it be rewritten to provide:

Local remedies do not need to be exhausted where there is no relevant connection between the injured person and the State alleged to be responsible.¹⁶⁴

The Special Rapporteur agrees with the proposal of the United States. The main purpose of subparagraph (c) was to provide for an exception to the local remedies rule where the injured person has no voluntary connection with the State alleged to be responsible for the injury — as in the case of cross-border pollution or straying aircraft.¹⁶⁵ Some members of the Commission then raised other situations in which it might not be necessary to exhaust local remedies, such as denial of entry to the territory of the respondent State or prohibitive costs.¹⁶⁶ The second part of subparagraph (c) was adopted to cater for such situations. However, as the United States points out, such situations are already covered by subparagraph (a). It is therefore proposed that the United States proposal be adopted, subject to the insertion of a phrase that makes it clear that the relevant connection must be absent at the moment of injury, as proposed by Austria.¹⁶⁷

¹⁶⁰ *Norwegian Loans case*, 1957 *ICJ Reports*, p. 9, at p. 39.

¹⁶¹ "The responsibility of a State may not be invoked if ... (b) the claim is one in which the exhaustion of local remedies applies and any available and effective remedy has not been exhausted."

¹⁶² *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, para. 76.

¹⁶³ Comments, p. 43.

¹⁶⁴ Comments, p. 44.

¹⁶⁵ The United States suggests that the commentary elaborate further on the absence of a relevant connection in the case of overflight (Comments, pp. 44-45).

¹⁶⁶ See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10)*, para. 60, commentary to draft article 16, para. 111, for further examples.

¹⁶⁷ Comments, p. 43.

Subparagraph (d)

80. Subparagraph (d) does not distinguish between express and implied waivers. The commentary does, however, make it clear that waiver may be implied where the intention to waive local remedies is clear.¹⁶⁸ This commentary will be redrafted to take account of Guatemala's helpful suggestion on this subject.¹⁶⁹

81. It is proposed that article 16 be considered in the following form:

Local remedies do not need to be exhausted where:

EITHER

(a) The local remedies provide no reasonable possibility of *available and effective* redress;

OR

(a) *The local remedies are obviously futile or manifestly ineffective. Exhaustion of local remedies is not obviously futile or manifestly ineffective where a forum was reasonably available to provide effective redress;*

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) *There was no relevant connection between the injured person and the State alleged to be responsible at the time of the injury;*

(d) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

17. Articles 17 and 18

Article 17

Actions or procedures other than diplomatic protection

The present draft articles are without prejudice to the rights of States, natural persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

Article 18

Special treaty provisions

The present draft articles do not apply where, and to the extent that, they are inconsistent with special treaty provisions, including those concerning the settlement of disputes between corporations or shareholders of a corporation and States.

82. Uzbekistan proposes that the heading to this part should be "Other provisions" rather than "Miscellaneous provisions".¹⁷⁰ This should be considered.

¹⁶⁸ See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 16, para. 116). For this reason there is no need to include an express provision on implied waiver, as suggested by Uzbekistan in Comments, p. 46.

¹⁶⁹ Comments, p. 45.

¹⁷⁰ Comments, p. 46.

83. As proposals have been made for the merger of articles 17 and 18,¹⁷¹ these two provisions will be considered together. Articles 17 and 18 serve the same purpose: to make it clear that the present draft articles do not affect, nor are they directly affected by, other procedures or mechanisms, under customary international law or treaty law, which provide methods for the assertion of rights or the settlement of claims. At first blush it might seem wise to merge the two provisions. Indeed the fifth report recommended such a merger in an article that read:

These articles are without prejudice to the rights of States or persons to invoke procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act [that might give rise to a claim for diplomatic protection by the State of nationality of the injured person].¹⁷²

However, it seems, on reflection, that in the light of the very different interests that articles 17 and 18 seek to serve, that the wisest course would be to retain two separate provisions.

84. Article 17 is essentially designed to ensure that the institution of diplomatic protection does not interfere with or obstruct the protection of human rights by other means. The Commission acknowledges that diplomatic protection is but one means for the protection of human rights, and a very limited one seeing that it is confined to the protection of the human rights of nationals. Other procedures for the protection of human rights are not limited in this respect. Human rights treaties confer rights and grant remedies to all humans whose human rights are violated, irrespective of nationality. Moreover, new developments in international law allow a State to protect — by protest, negotiation, arbitration and judicial proceedings¹⁷³ — both nationals and non-nationals subjected to the violation of human rights norms (with the status of *jus cogens*¹⁷⁴ or which qualify as obligations *erga omnes*¹⁷⁵) in foreign countries.¹⁷⁶ This was recently emphasized by Judge Simma in the *Case concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*,¹⁷⁷ in which he held that developments of this kind in international law would have made it possible for Uganda to protect both nationals and non-nationals whose human rights were threatened by the army of the Democratic Republic of the Congo at Kinshasa airport.

¹⁷¹ Qatar and El Salvador (Comments, p. 47). See also the Netherlands (Comments, p. 50).

¹⁷² A/CN.4/538, section D.2.

¹⁷³ Subject of course to the existence of a jurisdictional link. But this qualification is equally applicable to diplomatic protection.

¹⁷⁴ See articles 40, 41 and 48 of the draft articles on responsibility of States for internationally wrongful acts in *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, para. 77.

¹⁷⁵ *Barcelona Traction* case, 1970 I.C.J. Reports, p. 32.

¹⁷⁶ See further on this subject, G. Gaja "Is a State specially affected when its national's human rights are infringed?" in L. C. Vohrah et al. (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003), p. 373; G. Gaja, "Droits des États et droits des individus dans le cadre de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), p. 63; L. Condorelli, "L'évolution du champ d'application de la protection diplomatique" in *La Protection Diplomatique*, p. 3; and C. Forcese, "Shelters from the storm: rethinking diplomatic protection of dual nationals in modern international law", *George Washington International Law Review*, vol. 37 (2005), p. 469, at pp. 497-498.

¹⁷⁷ International Court of Justice, unreported judgment of 19 December 2005, separate opinion, paras. 17-41. See also the separate opinion of Judge *ad hoc* Katiko, para. 69.

85. Unfortunately the purpose of article 17 has not been fully understood. Enrico Milano has interpreted the relationship between the 2001 articles on responsibility of States for internationally wrongful acts and the 2004 draft articles on diplomatic protection to mean that the right of a State to intervene under article 48(1)(b) of the articles on responsibility of States for internationally wrongful acts on behalf of non-nationals whose *jus cogens* rights have been violated is limited by the draft articles on diplomatic protection, which require proof of nationality.¹⁷⁸ He reaches this conclusion by interpreting article 48 to be subject to article 44, which provides that the responsibility of a State may not be invoked if "the claim is not brought in accordance with any applicable rule relating to the nationality of claims", as now elaborated upon in the draft articles on diplomatic protection. This leads him to conclude that "under the law of State responsibility the mechanisms of diplomatic protection are accorded pre-eminence over those of human rights law, even when the injury to the individual is caused by a violation of his or her human rights".¹⁷⁹ He adds that

— from a joint reading of the 2001 Articles on Responsibility and the 2004 Draft Articles on Diplomatic Protection, the room left for the enforcement of *erga omnes* human rights obligations beyond the traditional mechanisms of diplomatic protection appears to be minimal.¹⁸⁰

86. Article 17 must dispel doubts of this kind by making it clear that the draft articles are in no way intended to obstruct other procedures for the protection of human rights. This purpose can best be served by a separate provision, like article 17. However it seems, judging by Milano's paper,¹⁸¹ that it has not achieved this result. In these circumstances it might be necessary to redraft article 17 to make its purpose ever clearer — though to the Special Rapporteur it seems difficult to make this intention clearer. Perhaps this might be achieved by the proposed reformulation offered by the Netherlands?

The rights of States, natural persons or other entities to resort to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

87. It is therefore proposed that article 17 be retained as a separate provision and that it read:

EITHER

The present draft articles are without prejudice to the rights of the States, natural persons or other entities to resort [under international law?¹⁸²] to

¹⁷⁸ "Diplomatic protection and human rights before the International Court of Justice: re-fashioning tradition?" *Netherlands Yearbook of International Law*, vol. 35 (2004), p. 85, at pp. 103-108.

¹⁷⁹ *Ibid.*, p. 106.

¹⁸⁰ *Ibid.*, p. 107. Milano suggests that the odd relation between article 44 and article 48 may have been caused by an oversight on the part of the International Law Commission to specify that article 34 applies only to claims of diplomatic protection and not to article 48. Perhaps he is right!

¹⁸¹ *Ibid.*, p. 107. Milano remains unconvinced by article 17.

¹⁸² The Netherlands suggests the deletion of this phrase on the ground that the right of States to submit an *amicus curiae* brief in domestic proceedings, as the European Union has done in United States legal cases, must remain unchanged. See Comments, p. 46.

actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

OR

The right of States, natural persons or other entities to resort to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

88. The intention of article 18 is to make it clear that the draft articles do not interfere with bilateral and multilateral investment treaties that may include different rules relating to the treatment of both individual and corporate investors. As these treaties differ substantially both in substance and form from those contemplated in article 17, it is wise to deal separately with these treaties.

89. Both Austria and Morocco object to the drafting of article 18, particularly in respect of the phrase "special treaty provisions".¹⁸³ Morocco, correctly, points out that the Vienna Convention on the Law of Treaties does not recognize the concept of "special treaties". It therefore suggests, and the Special Rapporteur recommends, that it be reformulated to read:

The present draft articles do not apply where, and to the extent that, they are inconsistent with special regimes provided for under bilateral and multilateral treaties regarding the protection of investments.

18. Article 19

Ships' crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection on their behalf is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.

90. Most States that have submitted comments have responded positively to article 19,¹⁸⁴ but have made a number of suggestions. Austria points out that the condition attached to the flag State's exercise of protection might be construed as being applicable to the right of the State of nationality of the crew members to exercise diplomatic protection. This may be overcome by splitting the provision into two sentences, as proposed below. Mexico asks the Commission to resolve the question of competing claims. The Commission has resisted this course in respect of claims by dual nationals and it would seem equally unwise or unnecessary to do it here. The Netherlands proposes that article 19 be incorporated into article 8 as they appear to belong together. This is, however, not correct. Article 8 deals with the extension of diplomatic protection to stateless persons and refugees, while article 19 recognizes the right of the State of nationality of a ship to seek redress on behalf of crew members but not to exercise diplomatic protection.

¹⁸³ Comments, pp. 47-48.

¹⁸⁴ Comments, pp. 48-49: Austria, Mexico, the Netherlands and Norway (on behalf of the Nordic countries).

91. The United States finds no fault with the principles expounded in article 19. However, it argues that as the right of the flag State to seek redress on behalf of crew members falls outside the field of diplomatic protection, it should not be included.¹⁸⁵ This issue should be considered by the Commission. On the other hand, it should be recalled that the Commission decided to include article 19 because the protection offered by the flag State is analogous to that of diplomatic protection, as recognized by the International Law of the Sea Tribunal in *The M/V "Saiga" (No. 2)* case,¹⁸⁶ and policy demands that both methods of protection be reaffirmed because ships crews are vulnerable and require all the protection they can get.¹⁸⁷

92. It is proposed that, if the Commission elects to retain article 19, it should do so in its present form. Alternatively it might split the provision into two sentences to meet Austria's criticism. In this form it might read:

The State of nationality of the members of the crew of a ship has the right to exercise diplomatic protection on their behalf. The State of nationality of a ship [The flag State?] may [similarly?] seek redress on behalf of crew members, irrespective of their nationality, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.

The Special Rapporteur prefers the original text, as he doubts whether it is open to the interpretation placed on it by Austria.

C. The right of the injured national to receive compensation

93. The present draft articles cover only the nationality of claims and the exhaustion of local remedies. They do not deal with the primary rules of diplomatic protection, that is, the rules governing the treatment of aliens. Nor do they deal with the consequences of diplomatic protection. The limited confine of the draft articles has been debated and approved by the Commission at both its fifty-sixth and fifty-seventh sessions. The decision not to deal with the consequences of diplomatic protection can be justified on the ground that the articles on responsibility of States for internationally wrongful acts, together with their comprehensive commentary, cover most aspects of this subject.¹⁸⁸ Nevertheless, there is one aspect of the consequences of diplomatic protection that is not considered in the articles on responsibility of States for internationally wrongful acts, namely, the question whether there is an obligation on the successful claimant State to pay over any compensation it may have received to the injured national. The draft articles have been criticized on the ground that they have missed the opportunity to recognize such a rule, albeit by way of progressive development.¹⁸⁹ Speaking in the Sixth Committee on 24 October 2005, the French delegate stated that the reasons given by the Special Rapporteur as to why it was not necessary to deal with the consequences of diplomatic protection were not fully convincing. Even if diplomatic protection constituted an exception with regard to the general law on responsibility, the

¹⁸⁵ Comments, pp. 49-50.

¹⁸⁶ *Saint Vincent and the Grenadines v. Guinea*, ITLOS Reports 1999, p. 10, paras. 103-107.

¹⁸⁷ See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 19.

¹⁸⁸ *Ibid.*, *Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77, articles 28-39.

¹⁸⁹ Milano, note 178 above, p. 108. See, too, G. Gaja, "Droits des États et droits des individus dans le cadre de la protection diplomatique" in J.-F. Flauss, *La Protection Diplomatique* (2003), p. 63, at p. 69.

question whether a State was under an obligation to pay over to an injured individual money that it had received by way of compensation for a claim based on diplomatic protection was fundamental.¹⁹⁰

A similar point was made by Austria in its comments to the Commission:

A further issue that deserves particular consideration is the problem of the relation between the individual whose rights are protected and the State exercising the right to diplomatic protection. It could be considered to address also the problem of the result of the exercise of diplomatic protection and the access of the individual to such a result. Of course, on the one hand, one could argue that this is a matter of the relation between a State and its nationals; on the other hand, however, it should be ensured that the injured individual in whose interest the claim was raised will benefit from the exercise of diplomatic protection.¹⁹¹

On reflection, the Special Rapporteur believes that the Commission should consider this issue, even at the eleventh hour.

94. The rule in the *Mavrommatis Palestine Concessions* case would seem to dictate that a claimant State has absolute discretion in the disbursement of any compensation it may receive in a claim brought on behalf of an injured national. If, as the rule claims, "By taking up the case of one of its subjects, ... a State is in reality asserting its own rights" and becomes "the sole claimant",¹⁹² it is difficult to argue, as a matter of logic, that any restraints are placed on the State, in the interests of the individual, in the settlement of the claim or the payment of any compensation received. As the State has "complete freedom of action",¹⁹³ it is not required to press for the full damages suffered by the injured national. Instead it may agree to a partial settlement, which often happens. This means that in practice the individual may receive as little as 10 per cent of the value of the claim.¹⁹⁴ In the Franco-Russian accord concluded in 1909, 99 per cent of the pecuniary rights of the natural and legal persons were conceded.¹⁹⁵ In 1914 the Superior Tribunal of Justice of Madrid dismissed the complaint of a national relating to the conclusion of a lump sum agreement between Spain and Morocco, holding that international practice permits the giving of indemnities less than the amount of damage.¹⁹⁶

¹⁹⁰ See A/C.4/60/SR.11, para. 73.

¹⁹¹ Comments, p. 8.

¹⁹² [1924] P.C.I.J. Series A, No. 2, at p. 2.

¹⁹³ In the *Barcelona Traction* case the International Court of Justice declared:

"The State must be viewed as the sole judge to decide whether its protection will be granted, and to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose case is exposed, the State enjoys complete freedom of action" [1970] I.C.J. Reports, p. 3, at p. 44, *emphasis added*.

¹⁹⁴ W. K. Geck, "Diplomatic protection" in *Encyclopedia of Public International Law* (1992), vol. 1, at p. 1058; D. Boderman, Interim report on "Lump sum agreements and diplomatic protection" in International Law Association, Report of the Sixty-ninth Conference, New Delhi (2002), p. 230; R. Lillich, "The United States-Hungarian Claims Agreement of 1971" 68 A.J.I.L. (1975), p. 534; R. Lillich and B. Weston, *International Claims: Their Settlement by Lump-Sum Agreements* (1975).

¹⁹⁵ D. Carreau, *Droit International*, 7th ed. (2001), p. 462, para. 3318.

¹⁹⁶ J. Pastor Ridruejo, "La pratique espagnole de la protection diplomatique" in J. F. Gascón, *La*

95. The Commission has accepted the rule in the *Macromati Palestine Concessions* case as the foundation for its draft articles. Out of deference to this decision it rejected a proposal that a State be obliged to exercise diplomatic protection to a national injured as a result of the violation of a norm of *jus cogens*. On the other hand, the logic of *Macromati* does not always prevail. Both the continuous nationality rule and the exhaustion of local remedies requirement undermine the logic of *Macromati* as they show that an injury to a national does not automatically confer on the claimant State a right to diplomatic protection. Nor is *Macromati* logically and consistently applied in respect of the assessment of the damages claimed, as compensation is generally calculated on the basis of the injury suffered by the individual. This was acknowledged by the Permanent Court of International Justice in the *Chorzów Factory* case¹⁹⁷ and is now said to be a rule of customary international law.¹⁹⁸ The anomaly of the legal situation was recognized by Judge Morelli in *Barcelona Traction* when he stated:

International reparation is always owed to the State and not to the private person, even in the case of compensation and despite the fact that the amount of compensation must be determined on the basis of the damage suffered by the private person.¹⁹⁹

If the damage suffered is to be "determined on the basis of the damage suffered by the private person", it seems that the claimant State is obliged to consult with the injured individual on this matter, which shows that the State does not have complete freedom of action in the making of a claim.

96. State practice is contradictory on this subject. While judicial decisions, both international and national, emphasize that the injured national has no right to claim any compensation received by the State, other national mechanisms suggest that States acknowledge that there is some obligation on them to disburse compensation received to the injured national.

97. In *Administrative Decision 1* the United States-German Mixed Claims Commission affirmed the wide discretion of the State:

In exercising such control [the nation] is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation and must exercise an untrammelled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised and the private owner will be bound by the action taken. Even if payment is made to the expatriating nation in pursuance of the award, it has complete control over the fund so paid to and held by it and may

Instruction Diplomatique (2001), p. 112.

¹⁹⁷ *Chorzów Factory Case* (Morelli), 1928 P.C.I.J. Series A, No. 17, p. 28. "The damage suffered by the individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State." *Tribunal Industriel des charbonnages* on this subject in *Revue Critique de Droit International Privé* (1978), pp. 811 and 824.

¹⁹⁸ D. Ballesteros Torres, *La Práctica de la retribución de la responsabilidad internacional* (1971), p. 68.

¹⁹⁹ (1970) C.I.J. Reports, p. 223.

to prevent fraud, correct a mistake or protect the national honour, at its election return the fund to the nation paying it or otherwise dispose of it.²⁹²

National courts have adopted a similar position.²⁹³

United Kingdom

In the *Civilian War Claimants* case,²⁹⁴ the claimants petitioned the Crown for a share of the reparations paid to the United Kingdom Government by Germany pursuant to the Treaty of Versailles for damage done during the First World War. It was held that when the Crown was negotiating a treaty with another Head of State, it was inconsistent with its sovereign position that it should act as trustee or agent for its nationals unless it expressly declared that it was so acting. There was nothing in the treaty to suggest this. Rather, the treaty left it to the Governments, as between themselves and their nationals, to determine how that money was to be distributed. This decision was recently affirmed in *Lancho Exports Ltd v. Export Credits Guarantee Department*.²⁹⁵

United States

As a matter of United States law, "the moneys received from a foreign Government as a result of an international award, or in settlement belongs to the United States"²⁹⁶ and the distribution of indemnities is left to the goodwill of Congress.

By cases decided by the Supreme Court of the United States, it seems to have been established that funds received from foreign Governments in settlement of claims of American citizens are national funds of the United States, that no claimant has as a matter of strict legal right any lien on funds obtained, and that Congress is not under any legal obligation to pay any claim

²⁹² *United States v. Germany* (1: N.R.L.A.R., vol. 7 (1922), p. 119, at p. 152. *Emphasis added.*

²⁹³ See R. Jennings and A. Watts, *Oppenheim's International Law*, 9th ed. (1992), vol. 1, p. 538.

²⁹⁴ [1912] A.C. 14. See also *Bushmore v. B* [1876] 1 Q.B.D. p. 487.

²⁹⁵ [1996] 4 All E.R. p. 671, at p. 687.

"(3) which the Crown espouses claims (eg. of nationals who are creditors of foreign State or nationals) and affords diplomatic protection (eg. by the negotiation of a treaty providing for payment to the Crown for distribution to its nationals); under international law the Crown is maintaining its own right in its own name for such protection of its nationals . . . (4) Subject to (3) above, in concluding and performing the obligations under such a treaty, the Crown does not act as agent or trustee for the nationals; and irrespective of the terms of the treaty and (as it seems to me) the characterisation of the payments of the treaty, payments made to the United Kingdom pursuant to such treaties are received by the Crown in a sovereign capacity and form the absolute property of the State . . . (6) The entitlement of the Crown to retain the payments made to it is not, as a matter of English law, affected by the terms of the treaty or whatever the Treaty may provide regarding their distribution. Nor can the terms of the Treaty affect or qualify the sovereign character of the Crown's receipt of such payments. . . . The Crown under English law has no legal or equitable, but at best moral obligation to fulfil those terms. If the Crown fails to do so, the only remedies lie in Parliament or (at the instance of the foreign government) in international proceedings. . . . (7) The Crown in distributing any payments received pursuant to a treaty may determine the character to be borne by the payments it makes and earmark such payments . . ."

²⁹⁶ American Law Institute, *Restatement of the Law (Fourth, Foreign Law, of the United States)* (1987), para. 902, pp. 148-149.

out of the proceeds of a fund, although undoubtedly there is a *moral* obligation on the Government to remit funds to persons who have suffered losses.²⁰⁵

France

In France diplomatic protection remains an "acte du gouvernement" — the last bastion of the non-rule of law — and the procedures for the attribution of indemnities have traditionally remained unsusceptible to judicial oversight.²⁰⁶

98. Despite the above assertions of the absolute right of a State to distribute compensation received as it pleases, it is not uncommon to find statements that the normal practice of a State in such a case is to pay money received to the injured individual. Geck, for example, argues that "the claimant State usually forwards to the injured individuals the damages paid by the defendant State".²⁰⁷ The commentary to the Harvard Draft is to the same effect: "... the normal practice of transfer by the Claimant State to the individual claimant of any reparation it secures".²⁰⁸ In order to understand statements of this kind it is necessary to examine the steps that States have taken to limit their discretion.

99. Beginning in the 1950s, States started to introduce judicial review of compensation awards. France, the United States and the United Kingdom set up Commissions for the distribution of lump-sum awards received from Eastern European States after World War II. This phenomenon was a consequence of the large number of claimants competing for a share in vastly inferior returns of the cumulative value of confiscated or nationalized private property. The distribution of the indemnity became a particularly delicate affair and it became judicious to create specialized agencies for this purpose. Each State designed a different procedure.

²⁰⁵ *Distribution of the Aving Award, Opinion of J. Reuben Clark, Department of State*, cited in Hackworth, *Digest of International Law*, vol. 9, p. 766.

²⁰⁶ B. Böttcher-Stern, note 198 above, at p. 108.

²⁰⁷ Note 194 above, p. 1057.

²⁰⁸ F. V. García-Amador, Louis B. Sohn and R. R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974), p. 151. In *Administrative Decision F* the umpire of the Mixed Claims Commission, United States and Germany, established under the agreement of August 10, 1922, said:

But where a demand is made on behalf of a designated national, and an award and payment is made on that specific demand, the fund so paid is not a national fund in the sense that the title vests in the nation receiving it entirely free from any obligation to account to the private claimant, on whose behalf the claim was asserted and paid and who is the real owner thereof. Broad and misleading statements susceptible of this construction are found in cases where lump-sum awards and payments have been made to the demanding nation covering numerous claims put forward by it and where the tribunal making the award did not undertake to adjudicate each claim or to allocate any specified amount to any designated claimant. [Citations omitted.] It is not believed that any case can be cited in which an award has been made by an international tribunal in favor of the demanding nation on behalf of its designated national in which the nation receiving payment of such award has, in claims as held "in trust for citizens of the United States or others" (Note 200 above, p. 152) the absence of fraud or mistake, hesitated to account to the national designated, or those claiming under him, for the full amount of the award received. So far as the United States is concerned it would seem that the Congress has treated funds paid the nation in satisfaction of specific claims as held "in trust for citizens of the United States or others" (Note 200 above, p. 152).

United States²⁰⁹

After the Second World War, several bloc settlements led to the creation in 1949 of the International Claims Commission under the International Claims Settlement Act 1949, to deal with the distribution of lump-sum agreements concluded with Yugoslavia and later Panama, and other popular democracies which had engaged in nationalizations. It was renamed Foreign Claims Settlement Commission of the United States in 1982. Its function is to distribute funds received from foreign Governments among the various claimants, after considering each claim separately and deciding on its validity and the amount due to each claimant on the basis first, of the particular accord at issue and second, applying "applicable principles of international law, justice and equity". The Commission is quasi-judicial in nature. There is no appeal from its decisions. There is a standing appropriation for the distribution of funds received by the United States from a Foreign Government. Thus, although the money received from settlements is money belonging to the Government of the United States, Congress has usually provided for payment to private claimants, especially to those whose claims are settled in accordance with decisions of the special United States claims commission dividing a lump-sum settlement.²¹⁰

United Kingdom²¹¹

The Foreign Compensation Commission was established by the Foreign Compensation Act 1950 with a view to distributing indemnities as a result of the accords concluded with Poland, Czechoslovakia and Yugoslavia. The Commission functions like an ordinary tribunal, applying domestic law. The law to be applied is determined by Orders in Council which in turn often mirror the terms of the accord in question. There is no appeal from their decisions.

France²¹²

In France the system works on an ad hoc basis with a Commission for the distribution of indemnities created for each of the accords executed, starting in 1951. A Commission to deal with the creditors in the Russian loans debacle spanning from the Russian Tsarist era, was established as recently as 1998.²¹³ There is no general right of appeal. Although not specified, the tendency of the Commissions is to apply international law, both treaty law and customary law.

100. Not too much significance can be attached to these developments, as they reflect national legal institutions.²¹⁴ Despite this, some writers insist that they have had an impact on international law.²¹⁵

101. Further evidence of the erosion of the State's discretion is to be found in the decisions of arbitral tribunals which prescribe how the award is to be divided.²¹⁶

²⁰⁹ *Third Restatement*, note 204 above, para. 713.

²¹⁰ *Ibid.*, para. 902.

²¹¹ J. Berlia, "Contribution à l'étude de la nature de la protection diplomatique", *Annuaire Français de Droit International* (1957), p. 63, at pp. 67-68.

²¹² *Ibid.*

²¹³ Carreau, note 195 above, para. 1172.

²¹⁴ *Ibid.*, para. 1173; Reuben Clark, note 205 above, at p. 763.

²¹⁵ See, for instance, Berlia, note 211 above, p. 70.

²¹⁶ *Boddecker-Stern*, note 198 above, at p. 109.

Moreover, in 1994 the European Court of Human Rights decided in *Beaumartin v. France*¹¹⁷ that an international agreement making provision for compensation could give rise to an enforceable right on the part of the injured persons to compensation.

102. Although there is some support for curtailing the absolute right of the State to withhold payment of compensation received to the injured national in national legislation, judicial decisions and doctrine, it can hardly be argued that this constitutes a settled practice or that there is any sense of obligation on the part of States which has limited their freedom of disposal. Public policy, equity and respect for human rights may all support the curtailment of the State's discretion in the disbursement of compensation, but this does not constitute a rule of customary international law.

103. It is suggested, in these circumstances, that the Commission seriously consider adopting a provision on this subject as an exercise in progressive development. The present draft articles contain little progressive development. Indeed a number of respondent States have criticized them on this ground. To adopt a provision on this subject would be to remove one of the major inequities of diplomatic protection. The following proposal is placed before the Commission:

- (1) In quantifying its claim for diplomatic protection a State shall have regard to the material and moral consequences of the injury suffered by the national in respect of whom it exercises diplomatic protection. [To this end it shall consult with the injured national.]

Comment: To a large extent this provision simply codifies existing practice.

- (2) When a State receives compensation in full or partial fulfilment of a claim arising out of diplomatic protection it shall [should] transfer that sum to the national in respect of whom it has brought the claim [after deduction of the costs incurred in bringing the claim].

Comment: The Commission may prefer to use the word "should" rather than "shall" in paragraph (2). This would create an imperfect obligation for States. Such a course is known to international law. For example, article 3 of the 1958 Geneva Convention on the High Seas¹¹⁸ provided that "in order to enjoy freedom of the seas on equal terms with coastal States, States having no sea coast *should* have free access to the sea". (Article 125 of the 1982 United Nations Convention on the Law of the Sea¹¹⁹ states that "Land-locked States *shall* have the right of access to and from the sea".)

¹¹⁷ No. 19287/89 [1994] ECHR 40. See, further, on the jurisprudence of the European Court of Human Rights, J.-F. Flaesch, "Contentieux européen et protection diplomatique" in Condorelli et al. (eds.), *Liberty, Justice et Paix* (2004), vol. I, p. 813, at pp. 829-830.

¹¹⁸ United Nations Treaty Series, 1-6465, vol. 450, p. 82.

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